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(editors)

EUFIRE 2018

European Financial Regulation

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This volume is the result of the project Jean Monnet CHAIR European Financial Regulation, reference no. 574702-EPP-1-2016-1-RO-EPPJMO-CHAIR, supported by the Erasmus+ Programme of the European Union, and reunites a selection of the papers presented at the International Conference „European Financial Regulation - EUFIRE 2018" organized at Alexandru Ioan Cuza University of Iasi, Faculty of Economics and Business Administration, in May 2018.

The papers published in Proceedings are exclusively engaging authors. The publisher and editors are not responsible for their content or for language proficiency.

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ISBN: 978-606-714-492-5

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700109 – Iaşi, str. Pinului, nr. 1A, tel./fax: (0232) 314947
http://www.editura.uaic.ro e-mail: editura@uaic.ro

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2018

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Descrierea CIP a Bibliotecii Naţionale a României
INTERNATIONAL CONFERENCE ON EUROPEAN FINANCIAL REGULATION (2018; Iaşi)
European Financial Regulation - EUFIRE 2018: Iaşi, 2018 /
ed.: Mihaela Tofan, Irina Bilan, Ana-Maria Bercu. - Iaşi: Editura Universităţii "Al. I. Cuza", 2018
Conţine bibliografie
ISBN 978-606-714-492-5

I. Tofan, Mihaela (ed.)
II. Bilan, Irina (ed.)
III. Bercu, Ana-Maria (ed.)
336

TABLE OF CONTENTS

SCIENTIFIC COMMITTEE 8

LIST OF REVIEWERS 9

SECTION 1.
EU FINANCIAL REGULATION AND FINANCIAL STABILITY

Ciprian APOSTOL,
THE IMPACT OF FISCALITY AT MACRO AND MICROECONOMIC LEVEL IN ROMANIA 13

Carmen TODERAȘCU (SANDU), Anca Florentina GAVRILUTĂ (VATAMANU),
DISCIPLINARY EFFECTS OF FINANCIAL INTEGRATION AND THEIR INFLUENCE ON GROWTH PATH 25

Mihai-Bogdan AFRĂSINEI, Mihai CARP,
THE INFLUENCE OF OFFSHORE LINKS ON FINANCIAL INDICATORS. EMPIRICAL STUDY ON COMPANIES LISTED ON THE BUCHAREST STOCK EXCHANGE 39

Violeta COJOCARU, Denis VOSTRICOV,
IMPLEMENTATION OF AIFs' REGULATION IN THE REPUBLIC OF MOLDOVA, BASED ON LUXEMBOURG EXPERIENCE 55

Mihaela TOFAN,
THE PRINCIPLES OF THE EUROPEAN UNION BUDGETARY REGULATION. TRADITION AND CONTEMPORARY REGYME 67

SECTION 2.
EU FINANCIAL AND BANKING REGULATION

Bogdan CĂPRARU, Iulian IHNATOV, Nicoleta-Livia PINTILIE,
COMPETITION AND INNOVATION IN BANKING SECTOR 87

Emil BĂLAN, Marilena ENE,
CONSIDERATIONS ON THE INFLUENCE OF THE FUTURE EUROPEAN MONETARY FUND ON THE ROMANIAN FISCAL POLICY 109

Bogdan FÎRȚESCU, Paula-Andreea TERINTE,
EFFECTS OF INTERNAL AUDIT CHARACTERISTICS ON BANK PERFORMANCE 117

Codrin MACOVEI,
LEGALIZATION OF RISK NOTIONS IN BANK CREDIT AGREEMENTS 131

CENTRAL UNIVERSITY LIBRARY

Bogdan-Florin FILIP,
BITCOIN AND THE ISSUE OF ITS REGULATION.....147

SECTION 3.
EU FINANCIAL REGULATION AND ADMINISTRATIVE AREA

Ana-Maria BERCU,
A COMPARATIVE ANALYSE OF SOCIAL DIALOG IN EUROPEAN ADMINISTRATIVE AREA.....167

Jarmila ŠEBESTOVÁ, Ingrid MAJEROVÁ, Irena SZAROWSKÁ,
TRANSPARENCY IN THE MUNICIPALITY SPENDING: FINANCIAL HEALTH INDEX.....177

Elena CIGU, Mihaela ONOFREI,
OVERVIEW ON FISCAL DECENTRALIZATION IN EUROPEAN UNION COUNTRIES.....191

Gabriela BOLDUREANU,
THE ECONOMIC AND SOCIAL IMPACT OF ENTREPRENEURIAL ACTIVITY.....203

Iuliana Claudia MIHALACHE, Mihaela TOMAZIU-TODOSIA, Felicia-Cătălina APETROI,
ECONOMIC MODELS OF FINANCING HEALTH SERVICES IN THE EUROPEAN UNION.....211

Natalia ZAMFIR, Pavel ZAMFIR,
ASSESSMENT OF IMPACT OF THE UKRAINE'S HYDRO POWER EXPANDING PROGRAM ON SUSTAINABLE DEVELOPMENT OF AQUATIC ECOSYSTEMS IN THE BLACK SEA REGION.....225

Magdalena CĂMĂNARU,
PERCEPTIONS ON RURAL VOLUNTEERISM AND ITS CONTRIBUTION TO SUSTAINABLE DEVELOPMENT IN ROMANIA. A CASE STUDY 235

Mihai-Bogdan PETRIȘOR,
ASPECTS REGARDING THE PROTECTION OF EMPLOYED WOMEN. COMPARATIVE LAW ELEMENTS.....249

Olesea PLOTNIC, Elena CIOCHINA,
THE FINANCIAL NATURE OF THE MARKET OF VOLUNTARY MEDICAL INSURANCE IN THE COUNTRIES OF THE EUROPEAN UNION.....257

SECTION 4.
EU PUBLIC SPENDING AND CONTROL

Sandra GRADINARU,
UNFAIR TERMS IN CONTRACTS CONCLUDED BY LAWYERS FROM THE PERSPECTIVE OF THE EUROPEAN UNION LAW AND THE COURT OF JUSTICE OF THE EUROPEAN UNION JURISPRUDENCE 275

UAIC "PETRU MAIOR" UNIVERSITY LIBRARY

Maria GROSU, Liviu-George MAHA, Ioan-Bogdan ROBU,
STUDY ON THE AUDIT OF PROJECTS FROM EUROPEAN FUNDS IN 2007-2013 AND IMPACT ON PRESENT AND FUTURE OF GRANTS....285

Simona GHERGHINA,
THE FIFTH ELEMENT. PUBLIC BUDGETS AND VALIDITY OF PUBLIC CONTRACTS....301

Ada-Iuliana POPESCU,
ENSURING INTEGRITY IN ROMANIA'S PUBLIC PROCUREMENT....313

Dan Constantin MÂȚĂ,
CONSIDERATIONS ON CIVIL FINE. BETWEEN THE TRADITION OF REGULATION AND THE NEED FOR REFORM....319

Cristina ONEȚ,
FUNDAMENTAL PRINCIPLES OF PUBLIC ACQUISITIONS AND THEIR LIMITS....327

Dan LUPU,
CORRUPTION AND PUBLIC SPENDING. EASTERN EUROPEAN COUNTRIES CASE STUDY....353

SECTION 5.
EU TAX LAW

Ioana Maria COSTEA, Despina-Martha ILUCĂ,
FIRST STEP IN A CONFLICTING DIALOGUE: PRELIMINARY PROCEDURE IN BUDGETARY AND FISCAL LITIGATION....365

Costel ISTRATE,
NON-CURRENT ASSETS DEPRECIATION AND IMPAIRMENT BETWEEN LEGAL, ACCOUNTING AT TAX RULES: EVIDENCE FROM ROMANIA....375

Ionela-Corina CHERSAN,
PARADIGM SHIFT IN AUDITING THE EUROPEAN PUBLIC INTEREST ENTITIES' ANNUAL REPORTS....389

Septimiu Ioan PUȚ,
THE USE OF LEGALLY UNDEFINED CONCEPTS IN THE PRACTICE OF ROMANIAN TAX AUTHORITIES....403

Sever-Alexandru SBÂRNĂ,
THE RESEARCHER IN TAX LAW. BETWEEN THE FULFILLMENT AND THE FAILURE OF HIS CALLING. AN ANALYSIS OF THE ANTI-ABUSE TAX RULES IN THE EU....413

Cosmin Flavius COSTAȘ,
TOWARDS A MAGNA CARTA OF TAXPAYERS' RIGHTS IN THE TIMES OF THE HUNGER GAMES?....427

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Section I

EU FINANCIAL REGULATION AND FINANCIAL STABILITY

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THE IMPACT OF FISCALITY AT MACRO AND MICROECONOMIC LEVEL IN ROMANIA

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Abstract
The notion of "fiscality" has emerged to meet the economic, financial and social needs of the state. On this notion there are many interpretations, understandings and definitions in the conceptual, methodological and applicative sense.
Taxes are how the state budget revenues supplies needed to finance public expenditure. At the same time, they represent an instrument of intervention in the economic and social life, because, by establishing their level, the state intervenes in carrying out economic and social activities and influences the population's consumption capacity.
Each state promotes its own fiscal policy. It establishes the number, type and size of taxes and duties that are structured in relation to different criteria to assess and analyze the effects of taxation on the dynamics of the economy. The tax strategy changes quite frequently, depending on economic, social and political, domestic and international developments.
Companies must comply with the accounting and tax rules and to keep records of all transactions according to regulations. The accounting principles, rules or rules are not, in some cases, the same as those in fiscality. Thus, the link between fiscality and accounting is complex.
The objective of the research is to identify the main tax changes and to highlight their impact on the formation of budgetary revenues, but also on the economic and financial activity of the companies. The research method is the non-participatory observation. The results of the research aim at highlighting the effects of macroeconomic and microeconomic fiscal changes in Romania.
Keywords: *fiscality; accounting; company; taxes; Romania.*
JEL Classification: H20, M41

1. INTRODUCTION

The Romanian economy in recent years has experienced a strong crisis, which has led to the implementation of tax policies with multiple and frequent changes regarding the tax base, the tax rate, the cancellation of taxes and the introduction of new ones.

Accession and integration into the European Union presupposed the abolition of customs barriers and the gradual harmonization of the Romanian tax system with those of the member countries.

The fiscal system implies all fiscal normative acts aimed at collecting taxes, taxes and other public financial resources in the process of distributing and redistributing the gross national product and is the expression of the political will of any country.

The fiscal reform implies the existence of a modern, coherent, efficient fiscal system and, last but not least, equitable tax, meant to ensure the revenue collection to the state budget. The improvement of the fiscal system is made taking into account the evolution of the national economy, the requirements of the European directives and the new developments in the tax system of the developed countries.

2. LITERATURE REVIEW

Fiscality has since its emergence been a subject of real interest for both practitioners and theoreticians, both at national and international level, which is why the studies on this subject are in a very large number and very varied as content. Starting from international publications (Simons, 1938; Hotelling, 1938; Wicksell, 1958; Ramsey, 1927; Oishi, Kushlev and Schimmack, 2018; Everhart, 2018) and continuing with the national ones (Mitu and Stanciu, 2018; Istrate, 2000; Vintilă, 2006; etc.). It can be noticed that the subject of taxation was approached at both macroeconomic and microeconomic level, from the theoretical and practical aspects.

Because this area is prone to many changes depending on multiple factors, we can say that fiscality will be in the future a very debated both practitioners and researchers in the field.

3. RESEARCH METHODOLOGY

The aim of the research is to identify the main tax changes and to highlight their impact on the formation of budgetary revenues, but also on the economic and financial activity of the companies. *The research method* is the non-participatory observation. *The results of the research* aim at highlighting the effects of macroeconomic and microeconomic fiscal changes in Romania.

The data source is represented by the Romanian tax legislation.

4. THE FISCAL SYSTEM IN ROMANIA

The functioning of the society requires the mobilization of the financial means necessary for the financing of public expenditures from the private domain. Thus, in the modern society appeared the notion of taxation, "the expression of taxes and duties paid to public budgets by natural and legal persons" (Ştefura, 2005), in order to correlate the public needs with the covering resources.

Public financial resources, i.e. budget revenues, are, from the point of view of the economic content, constituted by: compulsory receipts (taxes and fees,

contributions, payments), money issuance, funds from public loans, treasury (Ștefura, 2007).

Fiscality in Romania was governed first by the adoption of the Tax Code and Fiscal Procedure Code by the Parliament in December 2003. Subsequently, the tax system was modified through emergency ordinances, laws and government decisions. The last amendment was made by Law no. 111 of 16 May 2018 for amending and completing the Law no. 227/2015 regarding the Fiscal Code, published in the Official Gazette of Romania no. 422 of 17 May 2018.

Taxes and fees are the main source through which funding sources to cover the costs of public policy (Văcărel, 2007). French economist Pierre Lalumiere states that "without ceasing to be a means to cover public expenditure, tax has become a means of intervention in the economic and social field" (Lalumiere, 1970).

The system of taxes and fees must fulfill the following functions (Istrate, 2000):

- financing public spending;
- redistribution of income, according to the principle of equity;
- stabilizing economic activity or correcting imbalances for economic efficiency purposes.

Taxes and fees are classified according to several criteria (Stancu, 2002):

- *according to the form and background features* (Drăcea, 2013): direct taxes and indirect taxes;
- *by subject of taxation* (Filip, 2013): wealth tax, income tax, consumption tax (expenses);
- *by the purpose of introducing the tax*: financial taxes and tax (regulatory) taxes;
- *by frequency of achievement*: permanent (ordinary) taxes and incidental (extraordinary) taxes;
- *according to the administrative body imposing taxes*: central government taxes and local government taxes.

Tax liabilities are based on the need to build public financial resources and involving realization of taxable income, taxable property ownership or enjoyment of certain services performed by state institutions, both by individuals and by legal persons. The tax obligations are established on the basis of regulations.

The tax liability refers to the liability to pay taxes, fees, contributions and other amounts owed to the State, and broadly includes other liabilities to the taxpayer (the obligation to declare the taxable goods and income, the obligation to calculate, retain and record tax and other contributions in the books and records, any other obligations incumbent on taxpayers, in application of tax laws etc.) (Vintilă, 2006).

Fiscal management of a company is the sum of approaches and processes for managing its fiscal side.

Regarding the structure of debts to a company in settlement with the state budget, it includes (Pahone Costuleanu, 2008):

- taxes on profits;
- Value Added Tax;
- income tax on salaries;
- taxes on dividends;
- local taxes and fees;
- special funds (solidarity fund, support for state education, etc.).

Also, in relations with the state budget, there is also the possibility for companies to also benefit from some receivables related to subsidies to be received and extra paid contributions.

Among the objectives of the company's tax management can be found the following (Gisberto-Chitu, 2003): reduction of tax burden; time delay of the tax burden; the use of the tax variable in order to regulate in time the level of profit recorded by the entity; reducing costs and minimizing risk to meet the company's tax obligations.

5. IMPACT OF FISCAL REFORM IN ROMANIA

The global economy, which had a major impact on Romanian economic life since 1989, made the idea of a tax reform in Romania is needed.

In this context, the fiscal law in Romania has come to represent a very vast and even daunting field, with perpetual changes, followed by corrections. Thus, hundreds of normative acts have been issued to amend tax, registration, declaration or payment procedures. The result was not the one expected to attract more budget resources. Moreover, the level of budget revenues as a share of gross domestic product (GDP) continues to be the lowest in the European Union, the Value Added Tax (VAT) gap is the highest, the legislative uncertainty and the bureaucratic burden are at the highest rates. For example, the largest VAT collection deficits in 2015 were reported in Romania (37.2%), Slovakia (29.4%) and Greece (28.3%), compared to the lowest deficits, which were recorded in Spain (3.5%) and Croatia (3.9%), according to Eurostat data.

Romania's budget deficit of 2.9% of GDP in 2017 (25 billion ROL, 5.5 billion EUR) was the third largest budgetary deficit in the European Union, after that of Spain, of 3.1% of GDP and Portugal's GDP of 3% of GDP, as shown in Figure 1.

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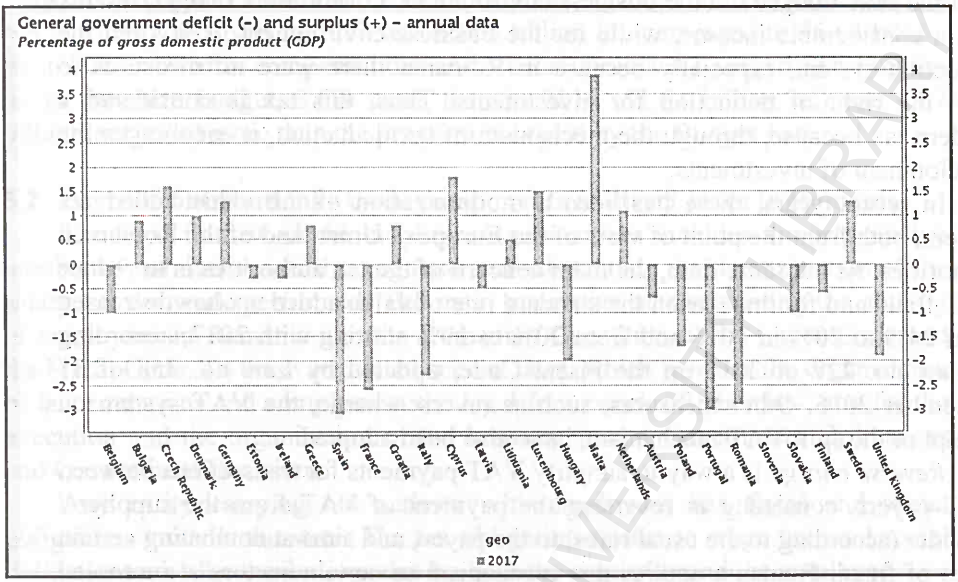
Figure 1. General government deficit and surplus in European Union, 2017



Source: (European Commission, 2018)

Since January 1, 2018, a number of norms and regulations have entered into force, which have generated pluses or sometimes minuses in population and company budgets. The most important changes are fiscal, but there are also some changes or even legislative news that have an impact in all economic and social fields. Companies will operate according to new rules, minimum wage and child-raising allowance have increased, and income tax rates have fallen from 16% to 10%.

To capture the main infuence of the tax reform, both at macro and microeconomic level, we chose to consider an indirect tax, value added tax represents a series of direct taxes represented payroll tax.

5.1 Value Added Tax - the main indirect tax in Romania

Considering the attention paid to this tax in Romania and abroad, value added tax is a current issue, especially due to the fact that it has a considerable impact on the formation of budgetary revenues and on the fiscal policy of Romanian companies.

Over time, this tax has covered three forms: cumulative tax, single charge, and single fractional payment. In Romania, the following applies: *the single tax* - before 1989, *the cumulative tax* - in the period 1989-1993 (tax on the movement of goods) *value added tax* - after 1993. Two VAT rates are currently in force: quota standard of 19% and reduced rates of 9% and 5%.

The emergence of value added tax in Romania was an important step for both the state budget and the business environment. For the state budget, the tax was a considerable income, while for the business environment, it favored the deduction system, especially because in Romania there were no measures to limit the right of deduction for investments. Thus, this tax is considered a modern tax because, through the mechanism of tax deduction, it encourages the development of investments.

In recent years, there has been a modernization of the value added tax system, both from the point of view of the European Union and of the Romanian authorities. At the same time, the main concern of the tax authorities is to reduce VAT fraud and for this reason the standard rate of value added tax has decreased from 24% to 20% in 2016 and from 20% to 19% starting with 2017, according to Law no. 227 of 2015 on the Fiscal Code, updated by Law no. 358 of 31 December 2015. Other measures, such as reverse charge, the VAT system on receipt or the split VAT mechanism, have also been adopted.

Reverse charge is a way to simplify VAT payments for transactions between VAT payers, consisting in reversing the payment of VAT from the supplier / provider (according to the usual rules) to the payee, and aims at combating certain types of fraud. Romania applies this mechanism in certain sectors at increased risk of fraud, such as shipments of waste, wood, grain and technical plants, electricity, green certificates transfer or greenhouse gas emission allowance transfer.

In the case of taxable persons applying *the VAT system to collection*, the chargeability of the tax occurs at the time of receipt of the full or partial consideration of the supply of goods or the provision of services. The implementation of the VAT system on collection has not changed the VAT rules. This system has no impact on the tax position of a company at the end of a fiscal period, but is just a system that radically changes the mechanism of payment of VAT amounts for transactions in the economy.

The VAT split system is a topic that has sparked many controversy and question marks in the business environment. The system was officially approved by Government Ordinance no. 23/2017 on the disbursement of VAT. Subsequent changes were brought by Law 275/2017. The stated purpose of the tax authorities to introduce the "split VAT" mechanism is to increase the collection of value added tax to the state budget. This mechanism operates only with VAT amounts declared by the taxpayer and obviously can only have an impact on the collection of these amounts. Implementation of this system faces a number of major difficulties, such as: blocking cash flows; additional costs, obligations and tasks related to the adaptation of ERP systems and accounting programs; changing internal working procedures and staff training; developing new payment systems and monitoring payments to multiple accounts and transfers from your current account to VAT accounts and more.

All the measures taken to regulate VAT have also had favorable consequences. Thus, according to a communique of the National Agency for Tax Administration, VAT actually received in 2017 was 68.08 billion lei, compared to 66.64 billion lei in 2016, and after compensations and rebates, from VAT surged 53.54 billion lei to the state budget, 3.6% more than in 2016 (51.67 billion lei) and 1.87 billion lei (1.3%) more than the program provided by the Budget Law.

5.2 Payroll contributions - basic components of direct taxes in Romania

The legal framework for employee remuneration includes a representative number of normative acts that regulate and substantiate the determination of the salary for the work performed. The main normative acts regulating the activity of employees in Romania are: the Romanian Constitution, the Labor Code and the Fiscal Code. To these are added special laws, which concern the organization of labor relations and complement the legal framework of labor law, and for the execution and the organization of the laws are issued Government Ordinances and Government Decisions.

Any entity carrying out activity with employees has fiscal and social obligations towards the state. The tax obligation relates to wage tax, and social obligations are all contributions due by both the employer and the employee.

To illustrate the multiple legislative changes in the salary field, we have presented in Table 1 the evolution of social insurance contributions related to salaries starting with 2003 and up to now.

Table 1. The evolution of social insurance contributions related to salaries in Romania

Years	Employer contributions for working conditions (%)			Employee contributions (%)	Normative act
	normal	difficult	special		
2003	34	39	44	9.5	Law no. 632/2002
2004	31.5	36.5	41.5	9.5	Law no. 519/2003
2005	31.5	36.5	41.5	9.5	GEO no. 139/2004
2006	30	35	40	9.5	Law no. 380/2005
2007	29	34	39	9.5	Law no. 487/2006
January 1 - November 30, 2008	29	34	39	9.5	Law no. 387/2007

Years	Employer contributions for working conditions (%)			Employee contributions (%)	Normative act
	normal	difficult	special		
1 December 2008 - 30 January 2009	27.5	32.5	37.5	9.5	Law no. 387/2007
February - December 2009	20.8	25.8	30.8	10.5	Law no. 19/2009
2010	20.8	25.8	30.8	10.5	Law no. 12/2010
2011	20.8	25.8	30.8	10.5	Law no. 287/2010
January 2012 - September 2014	20.8	25.8	30.8	10.5	Law no. 571/2003, modified by GEO no. 125/2011
October 2014 - December 2017	15.8	20.8	25.8	10.5	Law no. 123/2014 and Law no. 227/2015
Starting January 1st, 2018	-	-	-	25	GD no. 284/2017

The salaries of all employees in Romania have undergone major changes since January 1, 2018. First, the country's gross minimum wage increased to 1900 lei / month, according to Government Decision no. 846/2017 of November 29, 2017. Then, a number of contributions were transferred from employer to employee and salary tax decreased from 16% to 10%, according to the new tax code. Thus, for a gross salary of 3000 lei, the net income of the employee decreases in 2018, according to the data in Table 2.

Moreover, in the case of budget employees, gross salaries increased by 25% starting with January, according to the Framework Law no. 153/2017 on the remuneration of staff paid out of public funds. However, there are some important limitations for this increase. All bonuses, allowances, compensations, additions and other cumulative entitlements on the total budget for each authorizing officer may not exceed 30% of the basic salary and may not exceed the maximum wage set for each budget category in the annexes to The wage law, that is, those maximum wages that should be reached by 2022. If there are budgets which, with all other increases raised in 2017, are getting closer to the

2022 maximum, they will not receive a 25% increase for that this could mean exceeding that maximum threshold set in the law.

Table 2. Changes in salary and related contributions as of 01.01.2018

Elements	Legislation of 2017	Legislation of 2018
Gross salary	3000	3000
The employee pays to state budgets	896	1226
Net salary	*2104*	*1774*
Full salary	3691	3068
Employer pays to state budgets	691	68
State collects at state budgets in total	1587	1294

Source: (Apostol, 2018, p. 51)

Thus, in the case of some budget employees, this 25% increase was lower and in others there were even decreases in net income. To highlight this, the data in Table 3 will be taken as an example.

Table 3. Changes in the salary on 01.01.2018 as a result of the implementation of the Framework Law no.153 / 2017

Elements	Salary in December 2017	Salary in January 2018 (Framework Law No 153/2017)
Gross salary	*6938*	*7936*
Unemployment fund contribution	35	-
Health fund contribution	382	794
Social insurance contribution	728	1984
Net income	5793	5158
Trade union deduction	38	45
Basic computing revenue	5755	5113
Tax	921	511
Net salary	*4872*	*4647*

Source: (Apostol, 2018, p. 51)

The Law on Unitary Salary, as is known in the Framework Law no. 153/2017 also provides for other salary increases for two categories of administrative staff, namely for doctors and assistants, where the increases are substantial and the

other for the employees of the state education, who should receive 20% extra to salary starting March 1st. And in the case of these increases it should be mentioned that they will only be achieved if the maximum wage limits proposed for 2022 are not exceeded.

6. CONCLUSIONS

Therefore, the role of fiscality is to contribute to the formation of public financial funds, needed to finance public spending, and is also a tool for regulating the economy.

As noted in the study, fiscality is governed by a very large number of rules designed to attract as much funds as possible to the state budget. With only a few exceptions, this was only partially done; the level of budget revenues as a share of GDP in Romania continues to be the lowest in the European Union.

Tax reform is a complex process. In order to have the expected results, it should be based on principles and objectives focused on modernization and efficiency, in compliance with European directives. Thus, the tax law must be simple, easy to apply and equitably to all taxpayers.

References

1) Apostol, C. (2018). Analiza salariului în domeniul bugetar din România – principalul factor de motivare a forței de muncă. In: *Culegerea de articole științifice: Contabilitatea și auditul în condițiile globalizării: realități și perspective de dezvoltare*. Chișinău: Tipografia "Arva Color", pp. 47-53.
2) Drăcea, M. (2013) *Fiscalitate și armonizare fiscal*. Craiova: Universitaria.
3) Everhart, J.R. (2018). Unlimited tax liability: a common misnomer of limited liability company taxation in the United States. *Small Business Institute® Journal*, 14(1), pp. 44-51.
4) European Commission, (2018). *Eurostat*. [online] Available at: http://ec.europa.eu/eurostat/data/database [Accessed 15.04.2018].
5) Filip, G. (2013). *Finanțe*. Iasi: Alexandru Ioan Cuza University Publishing House.
6) Framework Law no. 153/2017 on the remuneration of staff paid out of public funds.
7) Gisberto-Chitu, A. (2003). *Contabilitatea micro si macroeconomică*. Bucuresti: CECCAR.
8) Government Decision no. 846/2017 of 29 November 2017.
9) Hotelling, H. (1938). The General Welfare in Relation to Problems of Taxation and of Railway and Utility Rates. *Econometrica*, 6(3), pp. 242-269.
10) Istrate, C. (2000). *Fiscalitate și contabilitate în cadrul firmei*. Iași: Polirom.
11) Lalumiere, P. (1970). *Les finances publiques*. Paris: Librairie "Armand Colin".
12) Law no. 111 of 16 May 2018 for amending and completing the Law no. 227/2015 regarding the Fiscal Code, published in the Official Gazette of Romania no. 422 of 17 May 2018.

13) Mitu, N.E. and Stanciu, C. (2018). Tax Principles between Theory, Practice and Social Responsibility. The Case of Romania. *Current Issues in Corporate Social Responsibility. An International Consideration*, pp. 11-24.
14) Oishi, S., Kushlev, K. and Schimmack, U. (2018). Progressive taxation, income inequality, and happiness. *American Psychologist*, 73(2), pp. 157-168.
15) Pahone Costuleanu, C.L. (2008). *Contabilitatea financiară a entităţilor patrimoniale*. Iasi: Tipo Moldova.
16) Ramsey, F.P. (1927). A Contribution to the Theory of Taxation. *The Economic Journal*, 37(145), pp. 47-61.
17) Simons, H.C. (1938). *Personal income taxation the definition of income as a problem of fiscal policy.* Chicago Illinois: The University of Chicago Press.
18) Stancu, I. (2002). *Finanţe*. Bucuresti: Editura Economică.
19) Ştefura, G. (2005). *Bugete publice şi fiscalitate*. Iasi: Alexandru Ioan Cuza University Publishing House.
20) Ştefura, G. (2007). *Proces bugetar public*. Iasi: Alexandru Ioan Cuza University Publishing House.
21) Văcărel, I. (2007). *Finanţe Publice*. Bucuresti: Editura Didactică şi Pedagogică.
22) Vintilă, G. (2006). *Fiscalitate. Metode şi tehnici fiscale*. 2nd ed. Bucuresti: Editura Economică.
23) Wicksell, K. (1958). A New Principle of Just Taxation. In: R.A. Musgrave and A.T. Peacock, eds., *Classics in the Theory of Public Finance,* International Economic Association Series. London: Palgrave Macmillan.

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DISCIPLINARY EFFECTS OF FINANCIAL INTEGRATION AND THEIR INFLUENCE ON GROWTH PATH

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Abstract
Given the fact that in the context of financial integration, to influence economic growth it is also necessary a consolidation of fiscal policy and the stability of public finances, in this paper we analyse the relationship between financial integration and fiscal policy, highlighting the importance of the disciplinary effects by reducing fiscal deficits and (discretionary) spending volatility of first concept. Basically, in our analysis, we want to build a research that stressed the importance of interplay between the variables involved, with the objective of economic growth. Our results suggest a high level of interconnectedness between the three variables namely financial integration, fiscal policy and economic growth and highlight that international financial integration has increased the importance of financial sector policies. In addition, we find that financial integration affects the composition of government debt and enhances risk-sharing by increasing the share of foreign debt to the total. So, countries need strong macro-prudential policy frameworks. For our analysis, we retrieved data from the Eurostat and World Bank, including the EU 28-member states over the 2000-2014 period.
Keywords: *financial integration; fiscal policy; economic growth.*
JEL Classification: E6, F02, H2, H6

1. INTRODUCTION

The approach of this paper provides a perspective in terms of fiscal and financial integration, considering that fiscal policy, besides introducing tax competition issues, concerns and connection issues on financial integration, with the desire of economic growth. From a theoretical point of view, financial integration can be beneficial for much more reasons, basically, we can exemplify the fact that contributes to international risk-sharing and domestic consumption smoothing (Kose *et al.* 2007), positively affects domestic investment and increases economic growth (Borensztein, De Gregorio and Jong-Wha, 1998; Claessens,

Kose and Terrones, 2010; Osada and Saito, 2010). Financial integration may also enhance the efficiency of the banking system and incentive the development of domestic financial markets (Chinn and Ito, 2008), and we have also a point of view it may that improve the quality of macroeconomic policies and enhance fiscal discipline (Obstfeld and Rogoff, 2009; Agénor, 2003).

In the most theoretical models, does not reach to a certain point of view regarding the impact of financial integration on fiscal policy. In fact, to provide a more pertinent research on the status of this area, we mention that only two studies analyse the (direct [1]) disciplinary effect of financial integration on fiscal policy and get opposite results. Ferris, Kim and Kitsabunnarat (2003) find that capital account liberalization has disciplinary effects on fiscal policy and contributes to reduce fiscal deficits. In contrast, Tytell and Wei (2004) find no evidence of the positive influence of financial integration on the budget balance. These two last studies use a similar panel of data and apply IV methodology, the major difference consisting in the way in which they measure the financial openness used in the analysis (*de facto* vs. *de jure*) [2].

Some studies analysed the relationship between fiscal policy and monetary integration. For example, Gali and Perotti (2003) find that that discretionary fiscal policy in EMU countries has become more countercyclical over time, following what appears to be a trend that affects the integration of other industrialized countries as well. Also, von Hagen and Brückner (2002) analysed the fiscal framework of EMU and show that it has not succeeded in safeguarding fiscal discipline, especially in the large member states.

There are other studies that consider that fiscal policy is related to different economic, social and cultural potential or territorial and administrative arrangement of individual countries, which prevents the full implementation of unified rules, valid for whole EU to a certain extent (Benova, 2014) and that a monetary union reduces the feasible divergence across countries in their present discounted levels of fiscal spending (Glick and Hutchison, 1993).

Other studies suggest that an important role has the audit variable, because all implemented policies require control to be validated, with the desire of economic growth. For example, according to the Fiscal Policy audit report (National Audit Office of Finland, 2017), his goal was to evaluate the policies about the reliability of macroeconomic forecasts. Furthermore, the fiscal policy audit refers to an external professional audit of the central government finances from macro-economic perspective and follows the effectiveness of tax policy and the reliability of the tax policy base information.

On the other hand, according to other studies conducted in past and present, we bring into question a new point of view, arguing that, financial integration can be beneficial, can positively affects domestic investment and increases economic growth (Borensztein, De Gregorio and Jong-Wha, 1998; Claessens, Kose and Terrones, 2010; Osada and Saito, 2010). Regarding the implications of

financial integration on improving tax policy, we can illustrate that in the context of liberalization, it requires a very rigorous fiscal discipline, and we can also interpreted this Financial integration as a signal that country's authorities wish to introduce and follow sound policies (Bartolini and Drazen,1997). Finally, we also agree that the effect of financial integration relies upon national authorities' preferences and characteristics, because there may be preferentially for a lower incentive to pursue costly fiscal consolidations, case of lower quality of national institutions. Even if the empirical literature show us an inconclusive point of view in what regards the relationship between the variables discussed in this paper, to the best of our knowledge, we relief some studies who analyse these variables and gives an important theoretical background. Ferris, Kim and Kitsabunnarat (2003) find that capital account liberalization has disciplinary effects on fiscal policy and contributes to reduce fiscal deficits. In contrast, Tytell and Wei (2004) find no evidence of the positive influence of financial integration on public finance. Furceri and Zdzienicka (2012) analysed the impact of financial integration on fiscal policy, and find that financial integration affects the composition of government debt. Gemmell, Kneller and Sanz (2011) affirm that the impact of fiscal variables on economic growth is ambiguous and depends on their nature.

This paper provides information regarding the relationship between financial integration and fiscal policy, in which case we quantified financial integration in terms of exchange rates and fiscal policy in terms of foreign direct investment, public debt and total fiscal pressure. Our approach aims to offer valuable information regarding the implications of these two variables on economic growth. The reminder of this paper is organized as follows: Section 2 provides methodology and data used in our study, Section 3 provides results and discussions of the analysis, and Section 4 provides the conclusions.

2. DATA AND METHODOLOGY

It is evident from the literature review section that several studies focus exclusively on the studying the link between financial integration and fiscal policy, with the result of what we call fiscal responsibility and other studies make reference to the link between financial integration and economic growth, however research supporting the need for consolidation in the direction of the objective of this study. Even if they have not made a variety of studies in this direction, there has been a general practice to utilize the countries including 20 industrial economies over the period of 1950–1994 and 1975–1999, respectively. Tytell and Wei (2004) use a de facto measure of financial integration while Ferris, Kim and Kitsabunnarat (2003) use a de jure measure of capital account openness. Furceri and Zdzienicka (2011) use an unbalanced panel of 31 OECD countries from 1970 to 2009, to show that financial integration has significant disciplinary effects by reducing fiscal deficits and (discretionary) spending volatility.

Based on variables used in the studies that covered the subject of financial integration and fiscal policy, for our research, the empirical analysis was performed based on a panel data regression between the dependent variable, economic growth, and the independent variables: Foreign direct investment (FDI); Exchange Rate (ER); Public Debt (PD); Total fiscal pressure calculated as Total taxes/GDP*100 (TFP) and Government bonds (GB), which will help us to create a clearer picture on the correlations between different variables. From the same point of view, we determined that the dependent variable that should be used will be the real GDP growth per capita and the independent variables will be: exchange rates of interest, foreign direct investment, public debt and total fiscal pressure.

We chose these variables because they have been used in other studies and more than that, making reference to the measurement of financial integration (Lane and Milesi-Ferretti, 2006) we find the following formula:

$$FI1_{it} = \frac{FA_{it} + FL_{it}}{GDP_{it}} \quad (1)$$

In this case, measure (FI1) is the share of the total stocks of external assets and liabilities to GDP, where FA and FL refer to the stock of foreign (debt, portfolio and direct investment) assets and liabilities, respectively.

The data used for our analysis focuses on the period 2000-2014, with an annual frequency. This information was obtained from the Eurostat databases and World Bank. The equation for the regression is expressed by the following formulas:

$$GDPgr = \alpha + \beta_0 FDI + \beta_1 ER + \beta_2 PD + \beta_3 TFP + \beta_4 GB + \varepsilon \quad (2)$$

Where:

GDPGR= Real GDP growth
FDI= Foreign direct investment
ER = Exchange rate
PD= Public debt
TFP= Total fiscal pressure-Total taxes/GDP*100
GB= Government bonds

In base of our research and based on previous studies we quantified financial integration in terms of assets and liabilities, taking into consideration: exchange rates, foreign direct investment, government bonds, public debt and total fiscal pressure. The purpose of our analysis is to show the implications of these two variables on economic growth. More exactly, we choose total fiscal pressure because financial integration can modify revenue structure and, in this

way, we can see the trend for long ter. Also, Furceri and Zdzienicka (2011) find that a higher level of financial openness is associated with higher taxes and public debt influence exchange rates. In terms of exchanges rates, we can notice that are the most important indicator of economic health and the most handled at government level (Argy and Hodjera, 1973). Regarding the motivation to take into account public debt and government bonds, it is well known that country deficits is less attractive to investors and can lead to inflation and higher taxation. Also, the assumption that governments bonds are perceived as net wealth by the private sector is crucial in demonstrating real effects of shifts in the stock of public debt. Barro (1974) finds that the standard effects of "expansionary" fiscal policy on aggregate demand hinge on this assumption.

3. RESULTS

For the analysis of the relationship between the financial integration, fiscal policy and economic growth we use data from the Eurostat.

For the case of total fiscal pressure, we appeal to our own calculations according to the above formula. Our variable choice has its incentive from the empirical studies in the area. First, fiscal policies are determinants for foreign direct investments, and this statement has both economic foundation and demonstrated through the studies (Göndör and Nistor, 2012). Second, the choice of Public debt and total fiscal pressure is motivated by the fact that fiscal policy and its implications on financial integration have a specific conjuncture that produces permutations among these variables.

Descriptive statistics of the variables are available in Appendix 1. Analysis of indicators aimed at central tendency, exemplified through the media reveals that the average value: -1.50 for GDP growth is due to negative values in some countries such as Cyprus, Finland and Croatia, 10.70 for Public debt, for fiscal pressure we have 0.26 and for exchange rates 89.58. The case of negative value of GDP growth we should mention that deficits due to the preponderance of values of the 28 countries. In the same sense, distribution of public debt is much dispersed that vary from the average level of 39.16905% of GDP positively and negatively. We can say that 68.2% of the total public debt distribution is between $\pm \sigma \bar{x}$ respectively 74.2643 ± 39.16905% of GDP and distribution of the total fiscal pressure is one less dispersed that vary from the average level of 0.06395% positively and negatively. We can say that 68.2% of the total tax burden is between $\pm \sigma \bar{x}$ 0.3618 ± 0.006395% respectively.

Table 1. Results of regression estimation of economic growth and fiscal policy for the EU- annual observations

Dependent variable: GDPGR		
Variable		
ER	-0.101***	(0.0198)
GB	-0.462**	(0.0900)
INV	0.235***	(0.0458)
PD	-0.019***	(0.0063)
TFP	-0.189**	(0.0303)
Number of observations	421	
R squared	0.392875	
F-Stat	39.48166	

First column is beta coefficient. Second column is the standard errors clustered at country level. *** denotes significant at 1%, ** at 5%., and * at 10%.

Source: author's calculations

Our analysis highlights the fact that all factors used in the regression model have what can be considered as the expected significant coefficient signs, being also explained by economic issues (Table 1). Referring to exchange rates, we can notice that there are significant and negatively correlated with economic growth, which means the higher is the level of exchanges rates, the lower is growth. The explanation in this case is that a higher level of interest rates will increase the ratio Public debt/GDP. In other words, for example, a 5% depreciation of the Romanian leu against the euro may add the equivalent of 1% of GDP to public debt. Our results are in line with other studies such as Furceri and Zdzienicka (2012), financial integration affecting the composition of government debt.

The investment rate (INV) has a positive and significant at the 1 percent level, this suggesting that the higher is the investment rate, the higher the growth. Our results are in line with other studies that suggest that financial integration can be beneficial, can positively affects domestic investment and increases economic growth (Borensztein, De Gregorio and Jong-Wha, 1998; Claessens, Kose and Terrones, 2010; Osada and Saito, 2010).

In case of government bonds rate (GBR), our analysis highlights that has the unexpected negative correlation to GROWTH and is significant at the 1 percent level. This interesting result, relate the fact that government bonds will be perceived as net wealth only if their value exceeds the capitalized value of the implied stream of future tax liabilities.

In terms of total fiscal pressure, who is one of the most common indicators for public sectors dimension, we found that is negatively correlated with economic growth, thus being in line with the economic theory. Furthermore our findings suggest that financial integration can modify revenue structure and in this way, we can see the trend for long term in our results are in line with other studies such as Furceri and Zdzienicka (2012) that showed that a higher level of financial openness is associated with higher taxes and public debt influence exchange rates.

In order to avoid the autocorrelation, we conducted the correlation table, The Pearson's correlation coefficient, which represents the covariance of the two variables divided by the product of their standard deviations, is presented in Appendix 2. Depending on the size of Pearson between of two variables, results a low negative correlation between GDP growth and the level of fiscal pressure, Pearson coefficient of-0.273 for risk of 1%. We also can see a direct and strong correlation between GDP growth on the one hand and foreign direct investment as a percentage of GDP because the Pearson coefficient is 0.388 with a probability of 99%. Regarding the exchange rates and fiscal pressure, we can remark a low negative correlation between these two variables, Pearson coefficient of-0.250 for a risk of 1%.

4. CONCLUSIONS

Our analysis suggests the fact that all factors used in the regression model have what can be considered as the expected significant coefficient signs, there is a significant relationship between the variables, namely financial integration, fiscal policy and economic growth and we considered that financial integration affects the composition of government debt, and only a consolidation of fiscal policies and specific instruments, would satisfy the desire of economic growth. We found that financial integration in fact contributes to growth, it brings capital and competition, foreign direct investments, management expertise and new technology but also can be highly volatile, and so, this financial integration can improve the management of fiscal policy. Free capital movement may reward good policies and penalize bad ones, thus highlighting the idea that this concept can conduct to fiscal discipline.

Even if in practice the impact of financial integration on fiscal policy is less obvious. Indeed, the disciplinary effect strongly depends on how risk premia change in relation to countries' fiscal positions and whether financial integration engages a country in international risk-sharing and consumption smoothing. On the other hand, we realize that increase public and private debt in many countries from developed world, it is a situation dramatically accentuated by the crisis. Now, for many of these countries, economic policy is dominated by the need to correct certain debts which are more difficult to finance and refinancing. In other words, the international financial integration has increased the importance of external borrowing. Furthermore, we found a direct correlation between financial integration

and fiscal policy and in the context of financial integration, to influence economic growth, it is also necessary a consolidation of fiscal policy, and the stability of public finances-we need to build strong frameworks for macroeconomic and financial sector policies. Capital flows can be large and volatile, global credit cycles might not fit each country's needs always, in many cases, financial integration had run ahead of regulatory and prudential frameworks, and international coordination efforts and we find a lot of liquidity-credit booms in some markets.

Taking the above caveats into account, this study demonstrates that deepening financial integration across a wide range of countries can help countries insure each other, but there are many challenges ahead, which means that each countries need strong macro-prudential policy frameworks.

NOTES

[1] Few studies have indirectly assessed the disciplinary effect of financial integration. For instance, Manganelli and Wolswijk (2009) find evidence of a disciplinary effect of financial integration on the euro zone bonds spreads.

[2] These studies use data for 54 (Ferris, Kim and Kitsabunnarat, 2003) and 62 (Tytell and Wei, 2004) countries including 20 industrial economies over the period of 1950–1994 and 1975–1999, respectively. Tytell and Wei (2004) use a de facto measure of financial integration while Ferris, Kim and Kitsabunnarat (2003) use a de jure measure of capital account openness.

References

1) Agénor, P.R. (2003). Benefits and costs of international financial integration: theory and facts. *The World Economy*, 26(8), pp. 1089-1118.
2) Argy, V. and Hodjera, Z. (1973). Financial integration and interest rate linkages in industrial countries, 1958-71. *Staff Papers (International Monetary Fund),* 20(1), pp. 1-77.
3) Barro, R.J. (1974). Are government bonds net wealth?. *Journal of political economy,* 82(6), pp. 1095-1117.
4) Bartolini, L. and Drazen A. (1997). Capital-account liberalization as a signal. *American Economic Review,* 87(1), pp. 138–154.
5) Benova, E. (2014). Fiscal policy of Slovak Republic in the process of European fiscal union creating. *Economic Annals XXI*, [online] pp. 24–27. Available at: http://soskin.info/userfiles/file/2014/11-12_2014/Benova.pdf [Accessed 05.04.2018].
6) Borensztein, E., De Gregorio, J. and Jong-Wha, L. (1998). How does foreign direct investment affect economic growth?. *Journal of International Economics*, 45(1), pp. 115-135.
7) Chinn, M.D. and Ito, H. (2008). A new measure of financial openness. *Journal of comparative policy analysis,* 10(3), pp. 309-322.
8) Claessens, S., Kose, A. and Terrones, M. (2010). Financial cycles: what? how? when?. *NBER International Seminar on Macroeconomics 2010*. University of Chicago Press.

9) Ferris, S.P., Kim, K.A. and Kitsabunnarat, P. (2003). The costs (and benefits?) of diversified business groups: The case of Korean chaebols. *Journal of Banking and Finance,* 27(2), pp. 251-273.
10) Furceri, D. and Zdzienicka, A. (2011). *Financial Integration and Fiscal Policy.* University of Crete, [online] pp. 1–25. Available at: http://economics.soc.uoc.gr/macro/docs/Year/2011/papers/paper_1_134.pdf [Accessed 23.05.2018].
11) Furceri, D. and Zdzienicka, A. (2012). How costly are debt crises?. *Journal of International Money and Finance,* 31(4), pp. 726-742.
12) Galí, J. and Perotti, R. (2003). Fiscal policy and monetary integration in Europe. *Economic Policy,* 18(37), pp. 533-572.
13) Gemmell, N., Kneller, R. and Sanz, I. (2011). The Timing and Persistence of Fiscal Policy Impacts on Growth: Evidence from OECD Countries. *Economic Journal,* 121(550), pp. F33-F58.
14) Glick, R. and Hutchison, M. (1993). Fiscal policy in monetary unions: Implications for Europe. *Open Economies Review,* 4(1), pp. 39-65.
15) Göndör, M. and Nistor, P. (2012). Fiscal policy and foreign direct investment: evidence from some emerging EU economies. *Procedia-Social and Behavioral Sciences,* 58, pp. 1256-1266.
16) Kose, M., Ayhan, P., Eswar, S. and Terrones, M.E. (2007). How Does Financial Globalization Affect Risk Sharing? Patterns and Channels. *IMF Working Paper no. 07/238.*
17) Lane, P. and Milesi-Ferretti, G.M. (2006). The External Wealth of Nations Mark II: Revised and Extended Estimates of Foreign Assets and Liabilities, 1970–2004. *IMF Working Paper no. 06/69.*
18) Manganelli, S. and Wolswijk, G. (2009). What drives spreads in the euro area government bond market?. *Economic Policy*, 24(58), pp. 191-240.
19) National Audit Office of Finland, (2017). *Fiscal policy monitoring report spring 2017.* [online] Available at: https://www.vtv.fi/app/uploads/2018/05/21045716/Fiscal-policy-monitoring-report_spring-2017.pdf [Accessed 25.03.2018].
20) Obstfeld, M. and Rogoff, K. (2009). Global imbalances and the financial crisis: products of common causes. In: *Asia and the Global Financial Crisis. Asia Economic Policy Conference, Santa Barbara, CA, October 18-20, 2009.* Federal Reserve Bank of San Francisco.
21) Osada, M. and Saito, M. (2010). Financial integration and economic growth: an empirical analysis using international panel data from 1974–2007. *Bank of Japan Working Paper Series, No.10-E-5.* Available at: https://www.boj.or.jp/en/research/wps_rev/wps_2010/data/wp10e05.pdf [Accessed 06.05.2018].
22) Tytell, I. and Wei, S.J. (2004). Does financial globalization induce better macroeconomic policies?. IMF, CEPR and NBER. [online] Available at: https://www.imf.org/External/Pubs/FT/staffp/2004/00-00/tytell.pdf [Accessed 12.04.2018].
23) Von Hagen, J. and Brückner, M. (2002). *Monetary and fiscal policy in the European Monetary Union.* Institute for Monetary and Economic Studies, Bank of Japan.

Appendixes

Appendix 1. Descriptive statistics

	REAL_GDP_ GROWTH	FOREIGN DIRECTINVESTMENT_	EXCHANGE_ RATES	PUBLIC_DEBT_ PIB_MIL	TOTAL_FISCAL PRESSURE
Mean	2.271429	6.879804	102.6550	71.76154	0.362214
Median	2.000000	1.907199	99.72000	67.45000	0.357000
Maximum	8.500000	109.9059	130.6800	179.7000	0.480000
Minimum	-1.500000	-1.637367	89.58000	10.70000	0.264000
Std. Dev.	2.280815	20.60831	9.022257	39.56350	0.063553
Skewness	1.155246	4.702277	1.449009	0.947054	0.241552
Kurtosis	4.768489	24.00090	4.751428	3.712651	1.987735
Jarque-Bera	9.876909	617.7309	13.37701	4.436811	1.467748
Probability	0.007166	0.000000	0.001245	0.108782	0.480046
Sum	63.60000	192.6345	2874.340	1865.800	10.14200
Sum Sq. Dev.	140.4571	11466.97	2197.830	39131.76	0.109053

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Appendix 2. Pearson`s Correlations

		Real GDP growth per capita	Exchange of interest rates	Government bonds rates	Investments % GDP	Debt % GDP	Total fiscal pressure
Real GDP growth per capita	Pearson Correlation	1	-.122*	-.255**	.388**	-.386**	-.273**
	Sig. (2-tailed)		.013	.000	.000	.000	.000
	N	420	420	420	420	420	420
Exchange of interest rates	Pearson Correlation	-.122*	1	.187**	.137**	-.220**	-.250**
	Sig. (2-tailed)	.013		.000	.005	.000	.000
	N	420	420	420	420	420	420
Government bonds rates	Pearson Correlation	-.255**	.187**	1	-.113*	.198**	-.268**
	Sig. (2-tailed)	.000	.000		.021	.000	.000
	N	420	420	420	420	420	420
Investments % GDP	Pearson Correlation	.388**	.137**	-.113*	1	-.537**	-.199**
	Sig. (2-tailed)	.000	.005	.021		.000	.000
	N	420	420	420	420	420	420
Debt % GDP	Pearson Correlation	-.386**	-.220**	.198**	-.537**	1	.324**
	Sig. (2-tailed)	.000	.000	.000	.000		.000
	N	420	420	420	420	420	420
Total fiscal pressure	Pearson Correlation	-.273**	-.250**	-.268**	-.199**	.324**	1
	Sig. (2-tailed)	.000	.000	.000	.000	.000	
	N	420	420	420	420	420	420

*. Correlation is significant at the 0.05 level (2-tailed).
**. Correlation is significant at the 0.01 level (2-tailed).

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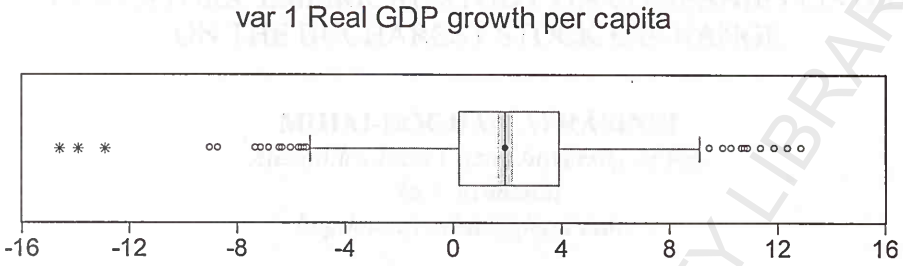
Appendix 3. One-Sample Test, ANOVA

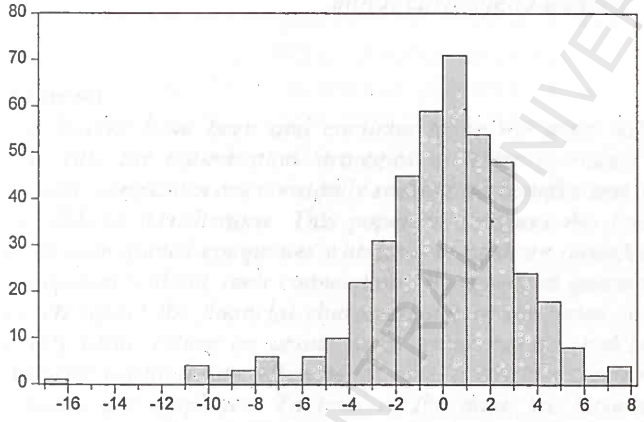
	Test Value = 0.05					
					95% Confidence Interval of the Difference	
	t	df	Sig. (2-tailed)	Mean Difference	Lower	Upper
Real GDP growth per capita	10.391	419	.000	1.9326	1.567	2.298
Exchange of interest rates	248.543	419	.000	100.43821	99.6439	101.2325
Government bonds rates	45.778	419	.000	4.25650	4.0737	4.4393
Investments % GDP	115.921	419	.000	22.56019	22.1776	22.9427
Debt % GDP	35.424	419	.000	54.3495	51.334	57.365
Total fiscal pressure	127.166	419	.000	36.0076	35.451	36.564

Sig value (0.000) is less than the threshold alpha (0.05), which entitles us to reject the null hypothesis and accept that there is a significant relationship between GDP growth and the independent variables taken into account, we also checked: Wald Test, ANOVA, Heteroskedasticity, Autocorrelation.

Appendix 4. Box plot representation of dependent variable



Appendix 5. Histogram-Normality test



Series: Standardized Residuals	
Sample 2000 2014	
Observations 420	
Mean	-5.22e-15
Median	0.343328
Maximum	7.518710
Minimum	-16.21074
Std. Dev.	3.136462
Skewness	-0.926993
Kurtosis	5.508315
Jarque-Bera	170.2559
Probability	0.000000

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THE INFLUENCE OF OFFSHORE LINKS ON FINANCIAL INDICATORS. EMPIRICAL STUDY ON COMPANIES LISTED ON THE BUCHAREST STOCK EXCHANGE

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Abstract
Tax havens have been and continue to be the main way through which companies elaborate tax optimization strategies in order to reduce their tax expenses. In this respect, companies are constantly seeking tax benefits and asset protection opportunities in offshore jurisdictions. This paper investigates the financial characteristics of the Romanian quoted companies with links to offshore jurisdictions by comparison with the companies without such connections. We involved quantitative variables in the study, which reflect the financial characteristics of the listed companies, such as: return on equity ratio, return on assets ratio, gross margin, indebtedness (financial leverage), turnover taxation rate, effective tax rate, intangible assets rate, tangible assets rate and revenue per employee. To analyse the data, we have used, complementary to the descriptive methods, the correlation analysis, the multiple regression analysis and the factorial multiple correspondences analysis. The analysis of the financial profile of the Romanian listed companies depending on the existence of connections to tax havens has emphasized a series of differences regarding their financial performance, indebtedness, structure of the assets and their tax burden.
Keywords: *tax havens; offshore jurisdictions; tax optimization; financial performance; effective tax rate.*
JEL Classification: F23, H26, M41

1. INTRODUCTION

One of the problems the actual business environment faces is represented by the fact that many companies exploit the existing gaps in the national and international regulations and transfer their profits from the countries they were gained to tax havens' jurisdictions, in order to reduce tax expenses. Given the fact that the capital can be easily moved in different jurisdictions, it can be said

that financial globalization may reduce the capacity of the countries to collect taxes (Georgescu, Toma and Grădinaru, 2013). In this regard, Thomas (1981) stated that *"the businessman or tax traveller may be compared with the seaman seeking shelter. He crosses the perilous seas of tax legislation, finding his way through the storms of audits and deemed remittances, and finally docks in the harbor of the paradise he is seeking. As all seamen know, each port has its own special features"*.

Though the subject of the taxation optimization through tax havens is not a new one, it has attracted more and more interest lately, being fuelled by the numerous financial scandals which have shaken the world of offshore business. Information leaks include millions of documents regarding the activities in the tax havens of some offshore companies, shell companies, trusts and foundations (Fitzgibbon, 2016; Bloom, 2016). In other words, *"the files show the offshore empire is bigger and more complicated than most people thought"* (Hopkins and Bengtsson, 2017). The most important information leaks in descending chronological order of the date they occurred are as follows: Paradise Papers – 2017 (1.4 TB of files revealed), Bahamas Leaks – 2016 (38 GB of files revealed), Panama Papers -2016 (2.6 TB of files revealed), Luxembourg tax files – 2014 (4.4 GB of files revealed), Offshore Secrets – 2013 (260 GB of files revealed) şi WikiLeaks – 2010 (1.7 GB of files revealed) (Hopkins and Bengtsson, 2017). As a result of the revelations, it has been found that some of the largest multinational companies in the world, numerous businessmen, politicians, sportsmen, cinema stars and celebrities secretly control offshore companies (Fitzgibbon, 2016; Bloom, 2016; Martin, 2017).

Table 1. Tax havens use by listed companies around the world

USA	UK	France	Spain	Romania
82 of the 100 largest US publicly traded companies have subsidiaries in tax havens	98 of the biggest 100 groups of companies listed on the London Stock Exchange have affiliates with tax havens	The top 40 listed companies at Euronext Paris (CAC40) have subsidiaries in tax havens	33 of the 35 companies listed on IBEX35 of the Madrid Stock Exchange are using tax havens	29 of the 80 companies listed on the Bucharest Stock Exchange have connections in tax havens
82%	98%	100%	94%	36%

Source: Afrăsinei, Georgescu and Georgescu (2016), ActionAid (2011), US Pirg (Smith, 2013), Rinuy and Chavagneux (2009) and Observatorio de Responsabilidad Social Corporativa (2012)

The use of tax havens for tax optimization is a practice that is used by companies almost all over the world. Even the listed companies, which are thought to be more transparent than the non-listed ones, appeal to such practices. Table 1 presents the usage of tax havens by the companies listed on the stock exchange in the United States of America, Great Britain, France, Spain and Romania.

Taxation is crucial to economic sovereignty and developing (Sharman, 2006). The problem is that companies are able to avoid paying taxes through tax planning techniques (mainly through transfer pricing), causing loses of budgetary revenues to countries where profits have been gained and slowing economic development (Sikka and Willmott, 2010). If in the developed countries, the effects of aggressive tax planning are not significantly felt, in the case of developing countries, the effects could be devastating (ActionAid, 2013; Christian Aid, 2009; Christian Aid, 2008). For example, Global Financial Integrity (Kar and Spanjers, 2014) estimates that between 2003 and 2012 illicit financial flows from developing countries through tax havens, anonymous companies and other legal entities and more precisely through misinvoicing trade transactions rises to 6.6 trillion US dollars. While in some countries economic development will slow down, tax havens will continue to prosper as long as there would be differences between countries in terms of tax rates (Thomas, 1981). In 2016, the structure of the budgetary incomes in Romania shows that the largest collections came from the social insurances (27.4%), VAT (23.1%), the taxation of wages and incomes (12.4%), excise duties (12%), non-fiscal incomes (8.1%) and other incomes (7.1%). The corporate tax has a share of only 6.9% of the total collection of budgetary incomes (The Ministry of Finance, 2016), which could suggest the export of profits by companies to other jurisdictions.

Tax havens and offshore financial centres have a significant impact on the international business environment, which can be easily noticed from the statistics regarding the source and destination of the foreign direct investments at global level. According to the data released by the International Monetary Fund (2016), six of the first ten countries according to the size of foreign direct investment inflows and five of the first ten countries according to the size of foreign direct investment outflows are tax havens. If the total value of foreign direct investments in the first ten countries reached 20,371,644 million US dollars, nearly 59% (119,937,370 million US dollars) were directed towards tax havens. Of these, the Netherlands ranks first (4,083,833 million US dollars), followed by Luxembourg (3,634,170 million US dollars), Hong Kong (1,414,922 million US dollars), Switzerland (985,724 million US dollars), Singapore (975,790 million US dollars) and Ireland (842,931 million US dollars). On the other hand, if the first ten countries according to the size of the foreign direct investments' outflows reported a total value of 23,618,118 Million US Dollars, it is important to highlight that nearly 55% of them are directed towards offshore jurisdictions. These are the Netherlands (5,093,952 million US

dollars), Luxembourg (4,419,265 million US dollars), Hong Kong (1,384,539 million US dollars), Switzerland (1,196,781 million US dollars) and Ireland (842,001 million US dollars).

Tax havens have also a significant impact on the Romanian economy. For example, according to the data released by the National Trade Register Office, at the end of 2016, there were 20,150 companies with investors from tax havens, from a total of 209,814 companies with foreign investors. Although the share is not very high (about 10%), it is interesting that investors from tax havens hold about 42% of the share capital of all Romanian companies with foreign shareholders. Amongst the tax havens that are the origin countries of the investors with the most significant contributions to the capital of Romanian companies, we can mention the Netherlands, Cyprus, Luxembourg, Switzerland, The Netherlands Antilles, the British Virgin Islands, Lebanon, the Bermuda Islands, Malta, Panama, Singapore, Marshall Islands, Seychelles, Liechtenstein, Belize and the American Virgin Islands (National Trade Register Office of Romania, 2016).

This data is confirmed by the statistics released by the National Bank of Romania, regarding the foreign direct investments in 2016. According to this evidence, approximately 40.5% of the foreign direct investments' inflows in Romania are from tax haven countries. The main source countries are the Netherlands (24.3%), Germany (13.2%), Austria (11.9%), France (6.9%), Cyprus (6.5%), Italy (6.3%), Luxembourg (4.3%) and Switzerland (3.6%). Practically, half of the first eight source countries according to the size of the foreign direct investments are tax havens. This evidence emphasizes the extremely significant role played by offshore jurisdictions in the Romanian economy investments (National Bank of Romania, 2017).

Over the years, little research has been carried out to study the microeconomic impact of the use of tax havens on the profitableness of companies, due to the difficulties regarding the collection of significant data. Such research requires, besides the financial indicators of the companies analyzed, information about shareholders, affiliates and even other affiliated parties (Fuest and Riedel, 2012). Currently, this information can be obtained through databases such as Amadeus or Orbis, or by manual collection from annual financial statements for listed companies. These companies are more transparent because they are usually required to publish annually audited financial statements and other similar reports. The quality of the information in these documents has a decisive impact on the investors' behaviour and decisions (Toma, 2012). This paper investigate the situation in Romania, an ex-communist developing country, regarding the influence of connections in tax havens on the position and financial performance of listed companies on the regulated market on the Bucharest Stock Exchange.

2. LITERATURE REVIEW AND RESEARCH HYPOTHESIS

A paper with a significant contribution to the microeconomic investigation on the activities of shifting profits from the source countries towards tax havens is the one of Fuest and Riedel (2012). Considering the approach and the methodology, the paper is seen by Janský and Kokeš (2015) as a "pioneering research" in the field. The study was carried out on a sample of 87,561 large firms that operate in developing countries in Asia (China, India, Indonesia, Malaysia, Pakistan, Philippines, Taiwan and Thailand), for which were used financial indicators corresponding to year 2006 from the Orbis database. The authors have carried out a statistical comparative analysis by grouping the companies in multinational companies, multinational companies with connections to tax havens and national companies. Results showed that multinational companies with connections to tax havens have a higher profitableness and pay higher taxes reported to the total assets, compared to the multinational companies with no connections in such jurisdictions; on the other hand, the values are lower than in the case of national companies. Multinational companies with connections to tax havens also register lower effective tax rates and indebtedness rate compared to the other companies.

Based on the methodology developed by Fuest and Riedel (2012), Janský and Prats (2015) have made a similar study on the case of India, collecting the data from the same Orbis database. Authors used a sample of 9,545 companies, of which 8,020 were national companies and 1,525 were multinational companies (738 with connections to tax havens and 787 without connections to tax havens). The results of statistical analysis show that multinational firms with links to tax havens reported lower profits (indicator measured as pre-tax profits per 100 units of assets), paid less in tax per unit of asset, pay less in tax per unit of profits (indicator used as a proxy for effective tax rate) and had higher debt ratios (indicator defined as the corporation's total debt as a share of total assets) compared to companies without connections in offshore jurisdictions. In conclusion, the authors stated that "the findings support the notion that when corporations have tax-haven links they face higher incentives and opportunities to shift income".

Also based on the methodology of Fuest and Riedel (2012), Janský and Prats (2015) have carried out a study in which they investigated the connection between tax havens and the erosion of the taxation basis of the multinational companies through the export of profits outside the Czech Republic. Authors used a sample of 13,603 companies registered in the Czech Republic, including 4,124 multinational companies, of which 528 companies had connections to tax havens. In their analysis, authors have used the following financial indicators: profitability per unit of assets, tax payable per unit of assets, tax payable per unit of profit and indebtedness per unit of assets. The results of the descriptive analysis have shown that companies with connections to tax havens register in

average a lower value of the profitability per unit of assets and tax paid in relation to assets compared to the companies with no connection to tax havens. Moreover, companies with connections to tax havens register a superior rate of indebtedness. On the other side, the results of the regression analysis have shown that there are no differences between the companies with connections to tax havens and the others regarding the profitability and taxes paid. Though, there is a significant statistical relationship between the presence of companies in tax havens and their indebtedness rate. Thus, companies with connections to offshore jurisdictions have a significantly higher indebtedness rate than the companies without such connections.

Within a similar study, Omar and Zolkaflil (2015) investigated the tax characteristics of the 100 largest multinational companies listed on the Malaysian stock exchange with branches in tax havens. Authors excluded the companies which operate in the financial field, thus using a sample of 60 companies of which 56 have subsidiaries in tax havens. The results of the descriptive analysis show that the companies with branches in tax havens report 39% lower profits and pay taxes per 100 units of profit 23% lower compared to the companies without subsidiaries in such jurisdictions.

In a study on a sample of 7,167 Romanian non-listed companies (3,370 with connections to tax havens and 3,797 without connections to tax havens), authors (Afrăsinei, Georgescu and Istrate, 2016) have identified the fact that the existence of such connections influence the profitability and the effective tax rates of the companies. Thus, firms that have links in offshore jurisdictions report a total assets turnover 0.232 higher (17.40%), a return on equity ratio 3.610 percentage points higher (14.08%), a return on assets ratio 2.516 percentage points lower (49.77%), a gross margin ratio 8.673 percentage points lower (204.04%) and an effective tax rate 1.136 percentage points lower (6.27%), respectively 3.899 percentage points lower (26.71% - effective tax rate calculated in a second version) than firms without links to tax havens.

Research hypotheses

H1: There is a profile of companies with connections to tax havens according to a series of financial indicators regarding the profitability, the taxation, the asset structure and the indebtedness.

H2: There is and thus can be estimated a significant correlation between the profitability of the listed companies on Bucharest Stock Exchange, the existence of the connections to tax havens, the indebtedness and revenue per employee.

3. RESEARCH DESIGN

The purpose of this research is to identify the financial characteristics of the Romanian listed companies on the regulated market of the Bucharest Stock Exchange that have connections to tax havens.

To determine which of the firms have connections to tax havens, we have analysed their annual financial statements published on the Bucharest Stock Exchange website (2018). Thus, we have considered that a company is connected to tax havens if: (1) it has shareholders from these jurisdictions which own more than 50% of the shares; (2) has subsidiaries registered in tax havens in which holds more than 50% of the shares, and (3) it has made transactions with affiliated companies which are located in tax havens (we have analysed the transfer prices).

The target population which we have considered within this analysis includes the companies listed on the regulated market of the Bucharest Stock Exchange. The sample was reached by eliminating the companies whose activity was financial-banking, as they own a different reporting basis. The analysed period is 2011-2016, and the source of the date is represented by the annual financial statements of companies.

Although the delimitation of the countries that could be considered tax havens has been a constant concern over the years, there is no generally accepted list by the international organizations and researchers. Until now, more lists have been issued, some of the most important being the ones issued by the United States Government Accountability Office (2008), Tax Justice Network (2007), Tax Justice Network (2005), International Monetary Fund (2000), OECD (2000), Financial Stability Forum (2000), Hines and Rice (1994) and Irish (1982). In our paper, we have used the same list as in the study „Addicted to tax havens: The secret life of the FTSE 100" performed by ActionAid (2011), as we consider it the most representative at the moment.

To analyse the data, we have used, complementary to the descriptive methods, the correlation analysis, the multiple regression analysis and the factorial multiple correspondences analysis.

We involved quantitative variables in the study, which reflect the financial characteristics of the listed companies, such as: return on equity ratio (ROE), return on assets ratio (ROA), gross margin (GM), indebtedness (financial leverage - FL), turnover taxation rate (TTR), effective tax rate (ETR), intangible assets rate (IAR), tangible assets rate (TAR), revenue per employee (W).

In order to identify the associations between the companies' characteristics, through the factorial multiple correspondences analysis, we created categorical variables. Thus, statistic elements were grouped in performing companies (ROE>4%) and non-performing companies (ROE<4%), respectively companies with high tax burden – High_tax (TTR>0.59) and with low tax burden (TTR<0.59), the disjunctive benchmark being represented by the level of the median of each data series.

The regression analysis required the testing of the econometric models whose relations are presented within the following equations:

$$ROE_t = \alpha_0 + \alpha_1 FL_t + \varepsilon_t \quad (1)$$

$$ROE_t = \alpha_0 + \alpha_1 W_t + \varepsilon_t \quad (2)$$

$$ROE_t = \alpha_0 + \alpha_1 FL_t + \alpha_2 W_t + \varepsilon_t \quad (3)$$

$$ROE_t = \alpha_0 + \alpha_1 FL_t + \alpha_2 W_t + \alpha_3 Conn + \varepsilon_t \quad (4)$$

$$ROE_t = \alpha_0 + \alpha_1 W_t + \alpha_2 LF*Conn + \varepsilon_t \quad (5)$$

$$ROE_t = \alpha_0 + \alpha_1 FL_t + \alpha_2 W*Conn + \varepsilon_t \quad (6)$$

Where:

α_0= constant expressing the average ROE, when the independent variables are null;

$\alpha_{1,2,3}$ = regression coefficients;

ε_t = residual variable.

To emphasize the differences between the two formed clusters depending on the existence of connections to tax havens, we created the "Conn" dummy variable, which has value 1 when the company has links in tax havens and value 0 in the opposite case. Data processing was made using the SPSS software.

4. RESEARCH RESULTS AND DISCUSSIONS

The carried out descriptive analysis (both at the level of the whole sample and at the cluster level, which were formed depending on the existence of connections to tax havens) identifies a series of significant connections, which can explain the operational behavior of the entities included in the study.

Table 2 presents the distribution of the values of some financial performance indicators (ROA and ROE) and of the indebtedness (FL). At the level of the whole sample, analysed listed companies register a low level of operational performance, reflected through the dimension of economic profitability (ROA=2.19%) with a normal distribution around the average, 50% of the entities registering lower values than 2.52% for this indicator. The low indebtedness (FL=0.65) has a positive effect on the activity of the listed entities, contributing to the enhancement of their global performance (ROE=4.63%).

The sequential analysis reveals a lower economic (operational) profitability in the case of companies with connections to tax havens (ROA_{conn} = 1.11% < $ROA_{without\ conn}$ = 2.75%). This situation can be explained by the existence of some operations which aim at reducing the operating result (tax optimization) through intra-group transactions, by under-evaluations of the sales or over-evaluation of the acquisitions.

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Table 2. Descriptive statistics on the financial performance and indebtedness of Romanian listed companies

Elements	ROA			ROE			FL		
	Total sample	*With connections*	*Without connections*	*Total sample*	*With connections*	*Without connections*	*Total sample*	*With connections*	*Without connections*
N	374	128	246	362	117	245	341	103	238
Mean	.0219	.0111	.0275	.0463	.0400	.0494	.6571	.8975	.5530
Median	.0252	.0170	.0276	.0403	.0376	.0413	.3344	.6793	.3088
Std. Dev.	.0666	.0731	.0624	.1086	.1203	.1027	.7769	.9053	.6908
Min	-.1792	-.1758	-.1792	-.3327	-.3217	-.3327	.0180	.0674	.0180
Max	.1583	.1580	.15830	.4483	.4463	.4483	3.909	3.909	3.800

Source: own processing

We also notice that the indebtedness is higher in the case of companies with connections to tax havens than in the case of companies without such links (FL_{conn} =0.89 > $FL_{without\ conn}$ = 0.55). This situation can be explained by the practice of intragroup loans to unblock domestic financial resources by maximizing interest rates. This issue also explains the effect that indebtedness has, the one of the operating profit erosion, through interest expenditures, finally determining a decrease of the net result, respectively a decrease of the financial profitability (ROE_{conn} = 4%). The effects of these practices are found in low levels of taxes paid, thus fulfilling the objective of reducing the tax burden. This objective justifies in most cases the presence of companies in tax havens.

The correlation between the efficiency of the trading activity and the tax burden of the companies is presented in Table 3, through the gross margin rate (also as an indicator of the pricing policy practiced by the entity), the taxation rate of the turnover and the effective tax rate.

Table 3. Structural analysis of sales profitability and tax burden

Elements	GM			TTR			ETR		
	Total sample	*With connections*	*Without connections*	*Total sample*	*With connections*	*Without connections*	*Total sample*	*With connections*	*Without connections*
N	366	125	241	362	124	238	360	123	237
Mean	.003	-.0174	.014	.0104	.0084	.0115	.1158	.0737	.1376
Median	.033	.0135	.0403	.0059	.0000	.0079	.1457	.0000	.1582
Std. Dev.	.156	.1641	.1513	.0122	.0130	.0116	.1023	.0975	.0980
Min	-.743	-.7439	-.731	.0000	.0000	.0000	.0000	.0000	.0000
Max	.255	.2511	.2556	.0485	.0482	.0485	.3543	.3427	.3543

Source: own processing

Despite the fact that at the level of the whole sample the companies register 0.3 ROL (national currency) for 100 ROL of the turnover, in the case of the

companies with connections to tax havens we identify an inefficient trading activity, registering a net loss of 1.4 ROL for 100 ROL turnover. The situation can be generated by the implementation of some low prices policy which determines the recognition of lower incomes reported to the operating and financial expenses that are associated to the operational process. Thus, the existence of intra-group transactions for tax optimization purposes can be confirmed. The conclusion is also supported by the information derived from the analysis of the taxation rate of the turnover (TTR). Entities with links to tax havens register a minimum level of turnover tax rate (8.4%) by paying a profit tax of 8 ROL for 100 ROL turnover, while entities without connections to tax havens pay a profit tax of 11.4 ROL for 100 ROL turnover. In this situation, the tax optimization strategies can generate both a decrease of the profit tax and also an artificial increase of the turnover, as a result of the intra-group transactions.

Also, from the analysis of the indicator regarding the effective tax rate (which reflects the total tax burden for 100 ROL gross profit), we identify a lowered tax effort (ETR_{conn} =7.37%) in the case of entities with connections to tax havens, compared to the ones without such connections ($ETR_{without\ conn}$ =13.76%), and also compared to the level of the whole sample (ETR_{total}=11.58%). These differences can be caused by the same tax optimization strategies identified in the case of the entities with links to tax havens made through specific activities such as: tax deductions for R&D activities, tax credits for the non-resident entities and non-taxable incomes registered through a permanent location in a foreign state. The indicators synthesized in Table 4 present the specific elements of the asset structure and of the employees' labor productivity, on the same pathway of the comparative analysis carried out between the two clusters, depending on the existence of connections of the Romanian listed companies in tax havens. The existence of tax optimization activities through connections to tax havens is identified also in this case.

Table 4. Analysis of the assets structure and employee productivity

Elements	IAR			TAR			W		
	Total sample	*With connections*	*Without connections*	*Total sample*	*With connections*	*Without connections*	*Total sample*	*With connections*	*Without connections*
N	364	130	234	370	134	236	363	126	237
Mean	.0045	.0053	.0040	.4956	.4668	.5120	327280	392693	292503
Median	.0012	.0013	.0010	.4829	.4649	.4985	218689	284189	207225
Std. Dev.	.0105	.0126	.0092	.1872	.1863	.1862	282160	305366	263119
Min	.0000	.0000	.0000	.1432	.1432	.1477	52116	53984	52116
Max	.0757	.0710	.0757	.9050	.9050	.9024	1489251	1295060	1489251

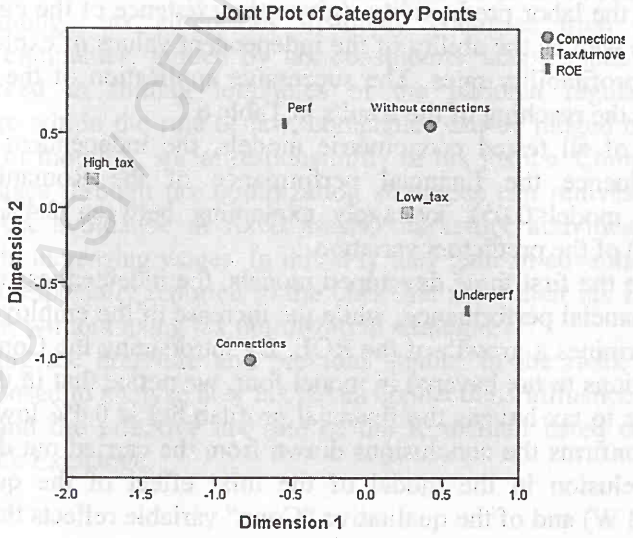
Source: own processing

The dimensions of the intangible assets' rate, which registers maximum values (0.053%) in the case of entities with links to tax havens, support the conclusion according to which these companies transfer their intangible assets (patents, licenses, etc.) at over-evaluated values, in order to reduce their profits, as well as to reach tax deductions. The low share of the tangible assets in the total assets (TAR_{conn} = 46.68%), registered in the case of entities with connections to tax havens, correlated to the significant size of the turnover which was generated by each employee (W_{conn} =392,693 ROL > $W_{without\ conn}$ =292,503 ROL) confirm the previous conclusions regarding the tax optimization strategies, through intra-group transactions, which lead to the over-evaluation of the turnover.

Through the factorial multiple correspondence analysis, we reached the diagram in Figure 1. It identifies the profile of the Romanian listed companies depending on the existence of connections to tax havens, the estimated performance through the financial profitability rate (ROE) and the taxation rate of the turnover. To this extent, on the basis of euclidean distances, we can notice that the performing entities (ROE>4%) have no connections to tax havens and are characterized by a high level of the turnover taxation (TTR>0.059), while non-performing entities (ROE>4%) generally have connections to tax havens and report a lower degree of turnover taxation (TTR<0.059).

These descriptive elements converge to the same conclusion regarding the use of the tax optimization strategies in the case of entities with links to tax havens.

Figure 1. Relationships regarding the financial performance of companies listed on Bucharest Stock Exchange



The identification demarche of the financial characteristics of the companies with connections to tax havens has been approached in depth through the correlation analysis and the multiple regression analysis.

Table 5 comprises the association relations between the variables which reflect the financial performance (ROA and ROE) and the indebtedness, respectively the labor productivity of employees. Through the Pearson correlation coefficient, we identify significant correlations between the analyzed indicators. Thus, between the performance indicators and the indebtedness, there is a reverse relation described by the negative value of this coefficient, while between the rate of labor productivity and profitability we notice a direct, but low intensity relation.

Table 5. Correlation coefficients on the link between financial performance, indebtedness and revenue per employee

Indicatori		ROA	ROE	FL	W
ROA	Pearson Corr.	1	.542**	-.191**	.156**
	Sig. (2-tailed)		.000	.000	.004
ROE	Pearson Corr.	.542**	1	-.198**	.073
	Sig. (2-tailed)	.000		.000	.184
FL	Pearson Corr.	-.191**	-.198**	1	.019
	Sig. (2-tailed)	.000	.000		.743

**Correlation is significant at the 0.01 level (2-tailed).

Source: own processing

The multiple regression analysis reveals the size of the influences on the financial performance of companies by the independent variables regarding the indebtedness and the labor productivity (given the existence of the connections to tax havens), as well as the ability of the independent values of explaining the variation of the profitability rates. The successive application of the proposed models has led to the reaching of the results in Table 6.

In the case of all tested econometric models, the independent variables significantly influence the financial performance of the Romanian listed companies (SIG model<0.05), averagely explaining between 2.4% and 6% ($0.024 < R^2 < 0.06$) of the predictors variation.

According to the first three developed models, the indebtedness negatively influences the financial performance, while the increase of the employees' labor productivity determines a growth of the ROE. By introducing the Conn dummy variable (connections to tax havens) in model four, we notice that in the case of entities with links to tax havens the financial profitability is 0.4% lower, which one more time confirms the conclusions drawn from the carried out descriptive analysis. The inclusion in the model of the mixt effect of the quantitative variables (FL and W) and of the qualitative "Conn" variable reflects the fact that

in the case of entities with connections to tax havens both the negative effect of indebtedness (α_4 = -0.010) and the decrease of the role of labor productivity in reaching performances (α_5 = 1.47) is manifested.

Table 6. Parameters of regression models

Independent variable	Constant	α_1FL	α_2W	α_3Conn	α_4FL*Conn	α_4W*Conn	N	R^2	Sig. model
ROE_1	0.042	-0.014					328	*0.037*	0.000
	(0.000)	(0.000)							
ROE_2	0.014		3.56				338	*0.024*	0.004
	(0.011)		(0.004)						
ROE_3	0.036	-0.016	3.04				302	*0.059*	0.000
	(0.000)	(0.001)	(0.006)						
ROE_4	0.040	-0.016	3,20	-0.004			302	*0.060*	0.000
	(0.000)	(0.001)	(0.005)	(0.074)					
ROE_5	0.034		3.19		-0.010		302	*0.057*	0.000
	(0.000)		(0.004)		(0.001)				
ROE_6	0.039	-0.016				1.47	302	*0.052*	0.000
	(0.000)	(0.001)				(0.022)			

* The SIG values associated with the variables included in the model are shown in brackets

Source: own processing

From the analysis through different methods, both descriptive and statistics, we emphasize the conclusion that, at the level of the analyzed listed companies, the connections to tax havens implies the existence of some activities which cause the financial performance decrease, in order to reduce the tax burden.

5. CONCLUSIONS

Tax havens have been and continue to be the main way through which companies elaborate the tax optimization strategies in order to reduce their tax expenses. Although tax authorities in many countries tried to stop this phenomenon, companies, guided by tax consultants, accountants, lawyers and bankers, succeed in finding loopholes of the national regulations. Since transactions are within the rule of law, companies can be judged only from the point of view of morality, social responsibility or tax justice. Companies which reduce their taxes through tax optimization strategies can reinvest their saved money from tax avoidance in fixed assets, marketing activities, training of employees or in increasing wages. In this way they gain an advantage compared to competitors, especially reported to the ones that meet their tax liabilities in a correct manner, without using tax optimization strategies.

Considering the literature and previous studies in the field, through this paper, we proposed to analyse how tax haven connections influence the financial performance and the effective tax rate of the Romanian listed companies on Bucharest Stock Exchange.

The analysis of the financial profile of the Romanian listed companies depending on the existence of connections to tax havens has emphasized a series of differences regarding the performance, the indebtedness, the structure of the assets and their tax burden. Therefore, there are clues that could lead to the conclusion that the companies with connections to tax havens are using tax optimization strategies, especially through intra-group transactions. Mentioned tax planning strategies include acquisitions, sales, loans, insurance in order to reduce financial results, with impact on the taxes paid. The existence of such a behavior has been confirmed through both dimensions of the research demarche, both trough the descriptive analysis and the correlation and regression analysis.

The study presents a series of limits represented by the relatively small size of the sample and the lack of some variables regarding the corporate governance. Future directions of the research aim at removing these limits, as well as the extension of the study to the level of the European developing economies.

References

1) ActionAid, (2013). *How Tax Havens Plunder the Poor*. [online] Available at: https://www.actionaid.org.uk/sites/default/files/publications/how_tax_havens_plunder_the_poor_2.pdf [Accessed 09.04.2018].
2) ActionAid, (2011). *Addicted to tax havens: The secret life of the FTSE 100.* [online] Available at: https://www.actionaid.org.uk/sites/default/files/doc_lib/addicted_to_ tax_havens.pdf [Accessed 09.04.2018].
3) Afrăsinei, M. B., Georgescu, I. E. and Georgescu, M. (2016). Analysis of the presence of Romanian listed companies in tax havens. *Journal of Eastern Europe Research in Business and Economics*, vol. 2016, 13 p.
4) Afrasinei, M. B., Georgescu, I. E. and Istrate, C. (2016). The Influence of the Connections of Romanian Non-Listed Firms to Tax Havens on Their Profitability. *CES Working Papers*, 8(4), pp. 572-596.
5) Bloom, D. (2016). 12 world leaders named in Panama Papers tax haven leak alongside inner circles in Russia, Syria and Egypt. *Mirror*, [online] Available at: https://www.mirror.co.uk/news/world-news/12-world-leaders-named-panama-7684959 [Accessed 07.04.2018].
6) Bucharest Stock Exchange, (2018). *Shares.* [online] Available at: http://www.bvb.ro/FinancialInstruments/Markets/Shares [Accessed 09.04.2018].
7) Christian Aid, (2008). *Death and Taxes: The true toll of tax dodging.* [online] Available at: https://www.christianaid.org.uk/sites/default/files/2017-08/death-and-taxes-true-toll-tax-dodging-may-2008.pdf [Accessed 09.04.2018].
8) Christian Aid, (2009). *The Big Tax Return.* [online] Available at: https://www.christianaid.org.uk/images/bigtaxreturnguide.pdf [Accessed 09.04.2018].
9) Financial Stability Forum, (2000). *Report of the Working Group on Offshore Financial Centres*. Basel. [online] Available at: http://www.fsb.org/wp-content/uploads/r_0004b.pdf?page_moved=1 [Accessed 28.04.2018].

10) Fitzgibbon, W. (2016). ICIJ Publishes Leaked Bahamas Info to Offshore Database. *International Consortium of Investigative Journalists*, September 21, 2016. [online] Available at: https://www.icij.org/blog/2016/09/icij-publishes-leaked-bahamas-info-offshore-database/ [Accessed 09.04.2018].
11) Fuest, C. and Riedel, N. (2012). Tax evasion and tax avoidance: The role of international profit shifting. In: P. Reuter, ed., *Draining development? Controlling flows of illicit funds from developing countries,* 1st ed. Washington D.C.: The World Bank, pp. 109-142.
12) Georgescu, I., Toma, L. and Grădinaru, D. (2013). Harmonization of Direct Taxes in the European Union–A Realistic Objective?. In: *8th International Conference Accounting and Management Information Systems*. Bucharest: ASE Publishing House, pp. 535-550.
13) Hines, J.R. and Rice, E.M. (1994). Fiscal Paradise: Foreign Tax Havens and American Business, *Quarterly Journal of Economics*, 109(1), pp. 149-182.
14) Hopkins, N. and Bengtsson, H. (2017). What are the Paradise Papers and what do they tell us?. *The Guardian,* 5 November 2017, [online] Available at: https://www.theguardian.com/news/2017/nov/05/what-are-the-paradise-papers-and-what-do-they-tell-us [Accessed 09.04.2018].
15) International Monetary Fund, (2000). Offshore Financial Centers, *IMF Background Paper*, [online] Available at: https://www.imf.org/external/np/mae/oshore/2000/eng/back.htm [Accessed 09.04.2018].
16) International Monetary Fund, (2016). *Coordinated Direct Investment Survey.* [online] Available at: http://data.imf.org/?sk=40313609-F037-48C1-84B1-E1F1CE54D6D5 [Accessed 09.04.2018].
17) Irish, C. R. (1982). Tax havens. *Vanderbilt Journal of Transnational Law*, 15(3), pp. 449-510.
18) Janský, P. and Kokeš, O. (2015). Corporate tax base erosion and profit shifting out of the Czech Republic. *Post-Communist Economies*, 27(4), pp. 537-546.
19) Janský, P. and Prats, A. (2015). International profit-shifting out of developing countries and the role of tax havens. *Development policy review*, 33(3), pp. 271-292.
20) Kar, D. and Spanjers, J. (2014). Illicit Financial Flows from Developing Countries: 2003-2012. *Global Financial Integrity Report*, December 2014, [online] Available at: https://www.gfintegrity.org/wp-content/uploads/2014/12/Illicit-Financial-Flows-from-Developing-Countries-2003-2012.pdf [Accessed 09.04.2018].
21) Martin, W. (2017). Paradise Papers: The biggest names caught up in the leak so far. *Business Insider UK*, [online] Available at: http://uk.businessinsider.com/paradise-papers-biggest-celebrities-named-2017-11/#shakira-1 [Accessed 09.04.2018].
22) National Bank of Romania, (2017). *Foreign Direct Investment in Romania in 2016.* Bucuresti: National Bank of Romania. [online] Available at: http://www.bnr.ro/DocumentInformation.aspx?idDocument=26095&idInfoClass=14364 [Accessed 09.04.2018].
23) National Trade Register Office of Romania, (2016). *Societăţi cu participare străină la capital. Sinteză statistică a datelor din registrul central al comerţului la 31 decembrie 2016.* [online] Available at: https://www.onrc.ro/statistici/2016/decembrie/Rap%20Sinteza%20Statistica_Investita%20Straina%20decembrie%20ro.doc [Accessed 09.04.2018].

24) Observatorio de Responsabilidad Social Corporativa, (2012). *La Responsabilidad Social Corporativa en las memorias anuales de las empresas del IBEX 35*. [online] Available at: https://observatoriorsc.org/la-responsabilidad-social-corporativa-en-las-memorias-anuales-de-las-empresas-del-ibex-35/ [Accessed 09.04.2018].
25) OECD (2000). *Towards Global Tax Co-operation.* Organisation for Economic Co-operation and Development, [online] Available at: http://www.oecd.org/ctp/harmful/2090192.pdf [Accessed 09.04.2018].
26) Omar, N. and Zolkaflil, S. (2015). Profit Shifting and Earnings Management through Tax Haven Subsidiaries: an Exploratory Analysis of Multinational Companies. *Procedia Economics and Finance, 28,* pp. 53-58.
27) Rinuy, M-S. and Chavagneux, C. (2009). Enquête exclusive: la présence des entreprises du CAC 40 dans les paradis fiscaux. *Alternatives Economiques no. 279,* [online] Available at: https://www.alternatives-economiques.fr/entreprises-francaises-aiment-paradis-fiscaux/00064044 [Accessed 09.04.2018].
28) Sharman, J. C. (2006). *Havens in a storm: The struggle for global tax regulation.* Cornell University Press.
29) Sikka, P. and Willmott, H. (2010). The dark side of transfer pricing: Its role in tax avoidance and wealth retentiveness. *Critical Perspectives on Accounting*, 21(4), pp. 342-356.
30) Smith, D. (2013). *Offshore Shell Games. The Use of Offshore Tax Havens by the Top 100 Publicly Traded Companies*. U.S. Public Interest Research Groups, [online] Available at: https://uspirg.org/sites/pirg/files/reports/Offshore_Shell_Games_USPIRG.pdf [Accessed 03.04.2018].
31) Tax Justice Network, (2005). *Tax us if you can.* Tax Justice Network, [online] Available at: http://www.taxjustice.net/cms/upload/pdf/tuiyc_-_eng_-_web_file.pdf [Accessed 03.04.2018].
32) Tax Justice Network, (2007). *Identifying tax havens and offshore finance centres..* Tax Justice Network, [online] Available at: http://www.taxjustice.net/cms/upload/pdf/Identifying_Tax_Havens_Jul_07.pdf [Accessed 02.04.2018].
33) The Ministry of Finance (2016). *Report on the final budget execution for 2016.* [online] Available at: http://discutii.mfinante.ro/static/10/Mfp/trezorerie/Rapexec2016final.docx [Accessed 25.03.2018].
34) Thomas, S.C. (1981). *How to form your own tax haven company privately.* Ontario: Euro/Financial Publishing Ltd.
35) Toma, C. (2012). Rolul auditului financiar în creşterea calităţii informaţiilor financiare. *Audit financiar, 10(95),* pp.5-13.
36) United States Government Accountability Office, (2008). *International Taxation: Large U.S. Corporations and Federal Contractors with Subsidiaries in Jurisdictions Listed as Tax Havens or Financial Privacy Jurisdictions.* Report to Congressional Requesters, GAO-09-157. Washington, D.C. [online] Available at: https://www.gao.gov/assets/290/284522.pdf [Accessed 28.03.2018].

IMPLEMENTATION OF AIFs' REGULATION IN THE REPUBLIC OF MOLDOVA, BASED ON LUXEMBOURG EXPERIENCE

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Abstract
Contemporary financial relations between investors and recipients related to effective management of financial resources have evolved in necessity of more effective application of flexible and efficient fund product structuring solution and asset management frameworks. Meeting of the needs of different types of investors makes legal regimes favourable and convenient, allowing implementation of various alternative investment strategies and permitting investments in a large variety of eligible asset classes. The current European aligning regulatory tendencies have not affected the stable functioning of AIFs, but on the contrary, offer conditions for more legally certain investment environment. The adoption of AIFMD on the level of EU brought the regulation of AIFMs at another level through the opportunities it has introduced. Many countries have placed AIFMD in operation fast and successfully. AIFMD regulates managers of AIFs, while regulation of AIFs remains at national discretion, that is why the mentioned draft may be significantly improved. Implementation of a comprehensive and consistent legal and regulatory framework for AIFs operation will offer a good tool for speeding-up and enhancing the quality of certain investment processes in Moldova. From the date of Republic of Moldova's independence proclamation in 1991, Moldova has evolved sufficiently so that organic necessity in appearance of AIFs has arisen. The first attempts to institute a national legal regime for AIFs started in 2008 and, currently, NCFM has prepared a draft of AIF Law which comes to compile into a single law transposition of AIFMD, ELTIF and EVCF Regulations. Owing a rich heritage dated back nearly one hundred years and more in offering very flexible investment vehicles, Luxembourg is one of the globally highest developed financial centres and first one in Europe. Authors disclose the research topic, based on the Luxembourg best and tested experience, which, adapted to the national specifics of Moldovan market, may serve a good example of AIFs regulation.
Keywords: *Alternative Investment Funds; Non-UCITS; Undertakings for Collective Investments; Collective Investment Vehicles; AIFs' Regulation; AIFMD; Asset Management; Structured Finance; Investment Funds; Risk-spreading Investments.*
JEL Classification: K2, K23

1. INTRODUCTION

The actuality and growing interest for using AIFs is explained by their convenience and high financial returns they may bring in conditions of lowered risks. Funds' assets usually are not correlated to conventional portfolio investments which can provide additional portfolio diversification, thus lowering overall portfolio risk and providing the opportunity for greater returns.

This paper aims at investigation the opportunities to create or improve national regulation of Alternative Investment Funds (AIFs) and Alternative Investment Funds' Managers (AIFMs) respectively. The necessity to conduct this a research in order to detect good practices in regulating AIFs lays down in the reaching of Moldova's capital market such a stage of development that requires more flexible and innovative investment products in order to boost investments and facilitate economy's funding. This paper makes an overview of the most successfully used AIFs of Luxembourg and furnish recommendations on which approaches regulators may adopt based on best Luxembourg experience.

The Grand Duchy of Luxembourg has built up a strong name due to providing different types of investors with a very attractive fund product structuring solutions. According to EFAMA (2017), Luxembourg is one of the countries which is home to the highest number of asset management companies. Due to the variety of investment vehicles, Luxembourg jurisdiction allows implementation of a large scale of alternative investment strategies.

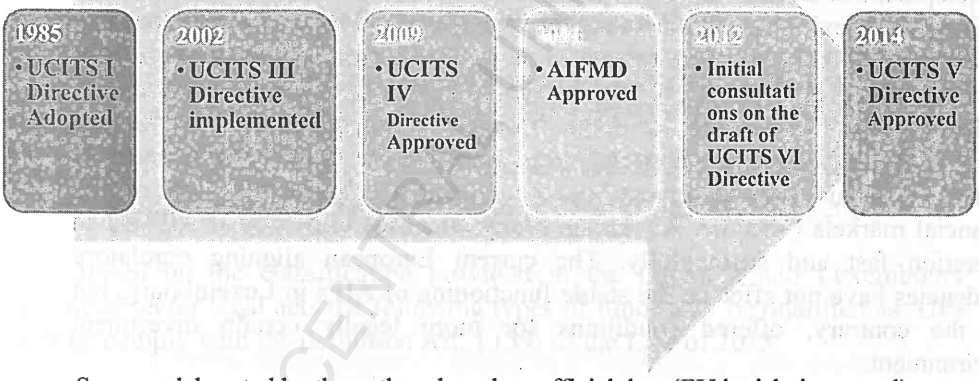
2. AIFS REGULATION EVOLUTION AND PERSPECTIVES

Luxembourg holds a huge heritage in providing investment solutions, looking back, it was always innovative and consistent in its regulatory approach. Financial industry-led policies in Luxembourg have successfully achieved the strategic goal to develop financial services sector and even now Luxembourg has managed to maintain the status of one of the most progressive global financial centres. Analysing the past experience, it can be observed that the success of Luxembourg as fund distribution centre is conditioned by many factors. Apart from maintaining a stable and well-working financial market infrastructure and providing high quality legal services, from the regulatory perspective, Luxembourg's legislator has always been very responsive to the needs of investors providing flexible and attractive investment vehicles, often allowing things that were not permitted in other jurisdictions, for example setting up multiple compartments and sub funds as well as multiple share classes (Professional Wealth Management Ltd., 2017).

Under the EU harmonisation process, being preceded by a long legislative process in 1985 the concept of *Undertakings for Collective Investment in Transferable Securities (UCITS)* was defined and UCITS I Directive was adopted. At the European level the adoption of UCITS I Directive (Council Directive 85/611/EEC of 20 December 1985) was a revolutionary point in

history when the first comprehensive legal framework for collective investment sector was established. The successful implementation of UCITS I was one of the contributors to Luxembourg fund-attractiveness, Luxembourg also was the first country to implement the UCITS Directive into national law (Association of the Luxembourg Fund Industry, 2017b). "This policy began in the year 1929 with the creation of the 1929 holding company, which has since been replaced, and continues today, as illustrated by the rapid transposition of the UCITS Directives and by legislation such as the law on Investment Companies in Risk Capital (SICARs) (2004), Securitisation (2004), the Specialised Investment Fund (2007), the Private Wealth Management Company-SPF (2007) and the law introducing a partial exemption on royalty income (2008)." (Agency for the Development of the Financial Centre, 2012).

Figure 1. Evolution of European framework in collective investment sector



Source: elaborated by the authors based on official data (EU legislative portal)

Besides the uniform protection of unit-holders, UCITS I aimed at approximating the conditions of competition between collective investment undertakings and align national governing laws in order to facilitate units' marketing within the EU Member States. The first notification system under UCITS I was introduced which provided that UCITS funds could market their units within the EU single market, only by notification of supervisory authority in other country without authorisation requirement. In the following years, in order to achieve the previous goals, UCITS I was amended by so called UCITS III, IV and V directives which made a number of reforms to the rules governing UCITS funds and their management (Figure 1). The last step taken in this

context was in 2012 when the European Commission placed for public consultation the initial draft of UCITS VI (Deloitte, 2013).

When in 2011 at the level of European Union has become clear that changes need to be introduced into the UCITS legal framework in order to adapt it to the modern conjuncture of financial markets and particularly to regulate and control the funds types that are not covered by UCITS Directive, the AIFMD (Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011, 2011) was adopted. AIFMD aims to provide for an internal market for Alternative Investment Fund Managers (AIFMs) and a harmonised and stringent regulatory and supervisory framework for the activities within the Union of all AIFMs, including those which have their registered office in a Member State (EU AIFMs) and those which have their registered office in a third country (non-EU AIFMs) (Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011, 2011, p. 4). The adoption of AIFMD on the level of EU brought the regulation of AIFMs at another level through the opportunities it has introduced. The Agency for the Development of the Financial Centre states that: "Through the AIFMD, the European Union created the first regulated environment for alternative investment funds worldwide" (Agency for the Development of the Financial Centre, 2018). Due to the very diverse types of AIFs already existing and operating on the national level, AIFMD does not regulate AIFs, AIFs therefore remain to be regulated and supervised at national level (Directive 2011/61/EU, p. 10). Instead, AIFMD offer an indirect regulatory and supervisory framework for AIFs through AIFMs regulation. On the one hand AIFMD focuses on investors'' protection, on the other hand, it seeks to address systemic risks generated by thee excessive reliance and trust on the financial markets (Van Til, K., 2014). Many countries have placed AIFMD in operation fast and successfully. The current European aligning regulatory tendencies have not affected the stable functioning of AIFs in Luxembourg, but on the contrary, offered conditions for more legally certain investment environment.

3. LUXEMBOURG ALTERNATIVE INVESTMENT FUNDS

If it comes to understand the place of AIFs in a variety of investment funds, AIFs represent non-UCITS funds. Generally, by the term "alternative funds" is meant all investment funds that are not already covered by the European Directive on Undertakings for collective investment in transferable securities (UCITS) (Agency for the Development of the Financial Centre, 2018).

The Commission de Surveillance du Secteur Financier (CSSF) is a public authority responsible for regulation, surveillance and supervision of the professionals and products of the Luxembourg financial sector. According to the definition provided by the Art.1 (39) of Law of 2013 (Law of 12 July 2013 on alternative investment fund managers, 2013), which is harmonised with AIFMD

definition (Directive 2011/61/EU, Art.4): 'AIFs' means collective investment undertakings, including investment compartments thereof, which raise capital from a number of investors, with a view to investing it in accordance with a defined investment policy for the benefit of those investors and do not require authorisation pursuant to UCITS Directive.

CSSF categorises AIFs established in Luxembourg (Lu AIFs) into four broad categories as illustrated in the Figure 2.

Figure 2. Luxembourg AIFs categories

Luxembourg AIFs	Investment Funds Subject to Part II of the Law of 17 December 2010 relating to undertakings for collective investment
	Specialised investment funds established under the Law of 17 December 2010 relating to undertakings for collective investment and fulfil the criteria under Article 1(39) of the Law of 2013
	SICARs established under the Law of 15 June 2004 relating to the Investment company in risk capital ("SICARs") if they fulfil the criteria under Article 1(39) of the Law of 2013
	Any entity not regulated under the Law of 2010, the Law of 2007 or the Law of 2004 that also meets the criteria of Article 1(39) of the Law of 2013

Source: compiled by the authors based on CSSF guidelines (CSSF, 2018)

Based on the classification provided in the Figure 2 and Luxembourg financial sector legal acts the following types of funds may be qualified as AIFs if they comply with the definition Art. 1 (39) of the Law of 2013.

Part II Funds

This type of investment collective investment vehicles is referred as the *Part II Funds* because they are regulated by the Part II (Other UCIs) of the Law of 2010 (*Law of 17 December 2010 relating to undertakings for collective investment as amended, 2010*). The Part II of the Law of 2010 applies to certain types of UCITS (Figure 3) and to all other Undertakings for Collective Investment (UCIs) not covered by Part I (applicable to UCITS) and other UCIs covered by special product Law (such as laws on Specialised Investment Funds (SIFs), Investment Company in Risk Capital (SICARSs) or Reserved Alternative Investment Funds (RAIFs).

Figure 3. UCI Part II undertakings

Part II Funds	UCITS of the closed-end type
	UCITS which raise capital without promoting the sale of their units to the public within the European Union or any part of it
	UCITS whose units, under their management regulations or instruments of incorporation, may be sold only to the public in countries which are not members of the European Union categories of UCITS determined by the CSSF, for which the rules laid down in Chapter 5 of the Law of 2010 are inappropriate in view of their investment and borrowing policies
	Any other non-UCITS not covered by Part I of the Law of 2010 and product laws

Source: compiled by the author based on Art. 87 and Art.3 of the Law of 2010

Although the units of these funds can be sold to the public, these UCI do not qualify as UCITS, because of their investment policy or because of the rules applicable to the distribution of their units/shares (Elvinger Hoss, 2017). Part II Funds can benefit of AIFMD passport if they comply certain conditions.

Specialised Investment Funds (SIFs)

According to the SIFs definition provided by the Law of 2007 (*Law of 13 February 2007 relating to specialised investment funds, 2007*), SIFs shall be deemed any undertakings for collective investment situated in Luxembourg the exclusive object of which is the collective investment of their funds in assets in order to spread the investment risks and to ensure for the investors the benefit of the results of the management of their assets. The securities or partnership interests of SIFs are can be traded to one or several well-informed investors. According to the Art. 2 of the Law of 2007, *well informed investors* comprise: institutional investors, professional investors and investors who have confirmed in writing that the adheres to the status of well-informed investor and they invest a minimum of 125.000 EUR in SIF or has been subject to the assessment within the meaning of CRD, MiFID or UCITS. SIFs are regulated, operationally flexible and fiscally efficient multipurpose investment fund regime. Comparing with Part II funds SIFs are characterised by greater flexibility with regard to the investment policy and a more relaxed regulatory regime (Association of the Luxembourg Fund Industry, 2017a).

Investment Companies in Risk Capital (SICARs)

This type of entities, regulated in Luxemburg under the Law of 2004 (*Law of 15 June 2004 relating to the Investment company in risk capital, 2004*), "it has simplified status under Luxembourg company law and is subject to limited regulatory supervision and favourable tax rules (such as exemptions from capital tax, income tax on qualifying income and dividend withholding tax)" (Grant Thornton Luxembourg, 2013). The purpose of the amended SICAR law was to facilitate fund-raising and investment in risk-bearing capital, SICARs are mainly used as vehicles for private equity or venture capital, even if investments in quoted companies or real estate are also possible under certain strict conditions. "The shares of a SICAR may, under certain conditions, be listed on a Stock Exchange" (KPMG, 2014).

Reserved Alternative Investment Funds (RAIFs)

In 2016 Luxembourg introduced an innovative multipurpose fund regime under the Law of 2016 (*Law of 23 July 2016 on Reserved Alternative Investment Funds, 2016*). The law regulating RAIFs represent a combination of SIFs and SICARs law, thus this type of fund combines the features of these two funds, providing more flexibility and convenience. RAIF can invest in any asset class, it can be open-ended or closed-ended, leveraged or unleveraged (Arendt and Medernach, 2017). Although RAIF is a non-regulated entity it is supervised through the AIFM which RAIF has an obligation to appoint for the management of its assets (the usual supervisory mechanism under AIFMD). The undoubtful attractiveness of RAIFs for the AIFs industry is may not be sufficient to replace traditional regulated AIFs, Alan Dundon (Dudon and Despret, 2016) fund services senior manager at Alter Domus states that: "Certain promoters will, for example, continue to favour establishing regulated product, often to respond to investor preferences. It does however represent an additional component to an integrated offer, and indeed a differentiating advantage over other jurisdictions, helping Luxembourg in its drive to offer a one-stop shop to the increasing and varying needs of the alternative investment industry."

Other Investment Vehicles

Other vehicles will refer to *Securitisation Vehicles*(SVs) organised under the Law of 2004 (*Law of 22 March 2004 on securitisation, 2004*), *Limited Partnerships* organised under the Law of 1915 (*Law of 10 August, 1915 on commercial companies, 1915*). In the first case, SVs in certain circumstances can be used as AIFs or may complement their structure. SVs fall under the CSSF supervision and may not benefit from the AIFMD passport, but they may be marketed to any type of investors.

Limited Partnerships, may be formed very quickly providing contractual freedom in their structuring and, in certain circumstances may benefit from

AIFMD passport. Limited Partnerships also benefit from very competitive tax environment under the Luxembourgish Law (Elvinger Hoss, 2017). Limited partnerships may serve as base for setting up other investment vehicle which qualify as AIFs, thus making those AIFs to benefit from this advantages too.

4. MOLDOVAN MARKET STATE OF PLAY

While Moldovan economy relies heavily on traditional bank intermediation, developed countries long ago has diversified their sources of financing of economy. International practice shows that a mixture of indirect financing through banks and direct financing via capital markets may appear as more optimal. There are many opportunities in using alternative investment products, which are both cost effective and more flexible in terms of assets, cash flows and other parameters. Although the legal framework exists the Capital Market financing in Moldova is not so popular.

The Republic of Moldova market is far from the level of development of Luxembourg financial market, and it is not necessarily that it shall repeat this path, but from the date of independence proclamation in 1991, Moldova has evolved sufficiently so that organic necessity in appearance of AIFs has arisen. First attempts to institute a national legal regime for AIFs started in 2008, currently National Commission on Financial Markets has prepared a draft of AIF Law which comes to compile into a single law transposition of AIFMD, ELTIF (Regulation (EU) 2015/760) and EVCF Regulations (Regulation (EU) No 345/2013). AIFMD regulates managers of AIFs, while regulation of AIFs remains at national discretion, that is why the mentioned draft may be significantly improved, considering the best and tested practices of other countries, adapted to the national specifics of Moldovan market. Implementation of a comprehensive and consistent legal and regulatory framework for AIFs operation will offer a good tool for speeding-up and enhancing the quality of certain investment processes in Moldova.

5. CONCLUSIONS

Some of European states prominently represent investment attractive jurisdictions due to adopting flexible and efficient fund product structuring solution and asset management frameworks. Meeting of the needs of different types of investors makes their legal regimes favourable and convenient, allowing implementation of various alternative investment strategies and permitting investments in large variety of eligible asset classes. Owning a rich heritage dated back nearly one hundred years and more in offering very flexible investment vehicles, Luxembourg is one of the globally highest developed financial centres.

More than 25 years ago Luxembourg has developed widely used corporate investment vehicles which could be used both as investment vehicles or as bases

for setting up AIFs. Moldovan regulators can make use of this model through expanding the types of investment vehicles which will respond to the needs of Moldovan investors. Luxembourg AIFs' regulation is attractive not only because of AIFs-tailored regulatory framework but it is close linked to the law on commercial companies (Law of 1915), for example the majority of Luxembourg investment vehicles may choose from the following types of legal forms of organisation, which may be incorporated entities or contractual law partnerships:

- a public limited company (SA);
- a private limited company (S.à r.l.);
- a partnership limited by shares (SCA);
- a limited partnership (SCS);
- a special limited partnership (SCSp);
- a common investment fund (FCP).

Thus, the further funds' rights and flexibilities are linked to the legal form chosen, which individually may benefit of different kind of attractive features (e.g. tax exemptions) under the general corporate law. Simultaneously, Moldova can develop favourable tax environment for these vehicles. Thus, combining both European regulations which Moldova is committed to transpose under the Association Agreement with EU, and one of the best AIFs regulatory models (Luxembourg) it can create or consolidate a comprehensive AIFs' regulatory framework. This enhanced framework will provide more choice and better returns for investors and will contribute to speeding up and optimisation of processes of capital attracting, which will have only positive effects on Moldova's economy.

References

1) Agency for the Development of the Financial Centre, (2012). *SOPARFI.* [online] Available at: Luxembourg of Finance website: http://www.luxembourg forfinance.com/sites/luxembourgforfinance/files/lff-brochure-soparfi.pdf [Accessed 27.03.2018].
2) Agency for the Development of the Financial Centre, (2018). *Alternative Investment Funds.* [online] Available at: http://www.luxembourgforfinance. com/en/products-services/investment-vehicles/alternative-investment-funds [Accessed 18.04.2018].
3) Arendt and Medernach (2017). *Reserved Alternative Investment Funds for EU and third-country AIFMs.* [online] Available at: http://www.arendt.com/publications /documents/brochures/2017.03%20-%20raif.pdf [Accessed 02.04.2018].
4) Association of the Luxembourg Fund Industry, (2017a). *SIF - Specialised Investment Funds | Alfi.* [online] Available at: http://www.alfi.lu/setting-luxembourg/alternative-investment-funds/sif [Accessed 03.04.2018].
5) Association of the Luxembourg Fund Industry, (2017b). *Historical overview and upcoming changes | Alfi.* [online] Available at: http://www.alfi.lu/setting-

luxembourg/ucits/historical-overview-and-upcoming-changes [Accessed 04.04.2018].

6) CSSF, (2018). *Frequently Asked Questions concerning the Luxembourg Law of 17 December 2010 relating to undertakings for collective investment (version 5, 5 January 2018).* [online] Available at: https://www.cssf.lu/fileadmin /files/Metier_OPC/FAQ/FAQ_Law_17_December_2010_050118.pdf [Accessed 15.04.2018].
7) Deloitte, (2013). *Moving towards UCITS VI Rolling back on complexity?* [online] Available at: https://www2.deloitte.com/content/dam/Deloitte/ie/Documents/ FinancialServices/investmentmanagement/2013_ucits_vi_briefing_deloitte_ireland. pdf [Accessed 12.04.2018].
8) Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers. (2011). (OJ L 174, 1.7.2011, p.1).
9) Dudon, A. and Despret, G. (2016). *Luxembourg's RAIF.* [online] Available at: http://www.alterdomus.com/download/427/2016-fund-europe-raif-luxembourg.pdf [Accessed 17.04.2018].
10) EFAMA - European Fund and Asset Management Association, (2017). *Asset Management in Europe.* 9th ed. [online] Available at: https://www.efama.org /Publications/Statistics/Asset%20Management%20Report/EFAMA%20Asset%20 Management%20Report%202017.pdf [Accessed 21.04.2018].
11) Elvinger Hoss, (2017). *Luxembourg Collective Investment Vehicles: Legal regime and features in a nutshell.* [online] Available at: https://www.elvingerhoss.lu/sites /default/files/documents/legal_topics/investment/EHP-Luxembourg-Collective-Investment-Vehicles-ENG.pdf [Accessed 18.04.2018].
12) Grant Thornton Luxembourg, (2013). *SICAR (Venture Capital Investment Vehicles).* [online] Available at: http://www.grantthornton.lu/online/www/navMain/publications/ 908/981/982/contentContainer/5168/4726/ENG/SICAR%20Presentation%20- %2019.06.2013.pdf [Accessed 21.04.2018].
13) KPMG, (2014). *Luxembourg SICAR.* [online] Available at: https://assets.kpmg. com/content/dam/kpmg/pdf/2014/08/Luxembourg-SICAR-2014.pdf [Accessed 24.04.2018].
14) Law of 10 August, 1915 on commercial companies ((Mém. 1915, p. 925)). (n.d.). Luxembourg: Service central de législation.
15) Law of 22 March 2004 on securitisation ((Mém. A 2004, No. 46)). (2004).
16) Law of 15 June 2004 relating to the Investment company in risk capital. (2004). Mém. A 2004, No. 95.
17) Law of 13 February 2007 relating to specialised investment funds. (2007). Mém. A 2007, No. 13.
18) Law of 17 December 2010 relating to undertakings for collective investment as amended. (2010). Mém. A 2010, No 239.
19) Law of 12 July 2013 on alternative investment fund managers. (2013) (Mém. A 2013, No 119)
20) Law of 23 July 2016 on Reserved Alternative Investment Funds. (2016). Mém. A 2016, No. 140.

21) Professional Wealth Management Ltd., (2017). *Inside the toolbox for investment products: Spotlight on Luxembourg - Chapter 3.* [Video file]. Available at: https://www.youtube.com/watch?v=uqUXMf_xY4I [Accessed 16.04.2018].
22) Van Til, K. (2014). *AIFMD & UCITS: From regulation to implementation and about the impact of new rules on the market.* Available at: https://www.synechron.com/sites/default/files/white-paper/AIFMD%20&%20UCITS.pdf [Accessed 04.04.2018].

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THE PRINCIPLES OF THE EUROPEAN UNION BUDGETARY REGULATION. TRADITION AND CONTEMPORARY REGYME

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Abstract
In the context of the present complex regulatory framework, the paper aims at identifying the impact of the budgetary principles on the public authorities' activity during the budgetary procedure. The Financial Regulation on the EU's general budget is a comprehensive document, which deals in detail with revenue and expenditure operations, audit, special funds and external actions. Still, this regulation merely sets out the general principles and basic rules governing the whole budget activity, whose positive regulation is mainly provided by the treaties, while the implementing provisions are contained in specific regulation. The attempt to draw strict and centralized presentation of fund allocations would not guarantee efficiency of the budgetary implementation procedure. To this end, derogations from the principles are regulated in various forms and the EU Commission is the institution entitled to manage these exceptional situations. The budgetary transfers seems to be the most used correction mechanisms for the budget forecast errors, the surplus from one indicator being used to cover the deficit from another, respecting the budgetary principles.
The influence of the budgetary principles is not only theoretical, but also it is present in the courts of law jurisprudence, both at national and EU level. The paper proves the increasing importance of these principles and their applicability in practice, showing the evolution of their impact in the last decade.
Keywords: *principles; budgetary regulation; EU budget; jurisprudence.*
JEL Classification: K10, K29, K34

1. INTRODUCTION AND LEGAL FRAMEWORK SUMMARY

In a general sense, the EU budget means the act that provides and authorizes budget revenues and expenditures each year. In order to regulate these notions, budget law includes all the rules for drawing up the draft budget, approving the budget, implementing it and controlling budget execution. These principles of EU law are basically budgetary principles inspired by the national budget laws of the member states, present in Romanian budget law, too.

The legal principles are guiding ideas of the entire regulation, which are important both in theory and in practice (Popescu, Tofan and Bercu, 2013). Compliance with the principles enshrined in EU budget regulation is essential to ensure the financial sustainability of European institutions.

In the present context of deepening the political union, the reform of the euro-zone is required and the influence of the principles of law is essential for respecting the general values on which the EU was funded (De Quadros and Sidjanski, 2017). From the point of view of the legal framework for regulating budgetary principles at EU level, the need for legislative and administrative simplification, as well as for ensuring a high degree of rigor in the management of European finances, outlined the idea of adopting the Financial Regulation in 1977. The Treaty on the European Union (1992) has made important changes to budget principles, but not fundamental. Thus, art. 268 reaffirmed the principle of mandatory enrolment of all expenditures and revenues in the budget, the annual principle and the principle of budget balance, respecting the older text. In addition, the treaty provided that all administrative expenditure on foreign and security policy and for justice and home affairs have to be set out in the general budget of the EU.

The provisions of the Treaties on budgetary matters are complemented by a number of provisions included in inter-institutional documents, the main purpose of which is to limit the risks of budgetary conflicts between the Commission, the Council and the European Parliament. For this purpose:

- The Joint Statement of 30 June 1982 has given important insights into the budgetary procedure, defining and classifying compulsory expenditure and voluntary expenditure. This distinction has great importance because it divides the powers into the establishment of expenditure between the Council and Parliament;
- The Inter-institutional Agreement of 29 October 1994 on budgetary discipline and improvement of the budgetary procedure, which renewed and replaced the Agreement, concluded on 29 June 1988 by the Council, the Commission and the Parliament. This agreement covered the planning and management of expenditure for the 1993-1999 period;
- Joint Declaration of 6 March 1995 on the insertion of financial provisions in legislative acts;
- The Inter-institutional Agreement of 6 May 1999 on budgetary discipline and improvement of the budgetary procedure; this normative act does not bring out substantive changes, but it has the advantage of presenting in a single text all the principles and rules laid down by other normative texts;
- The Convention on the Future of Europe proposed a change in the budgetary procedure eliminating the artificial difference between compulsory and non-compulsory expenditure.

The general budget of the European Communities was regulated by the Financial Regulation (EC, EURATOM) no. 1605/2002 of 25 June 2002, substantially amended by Council Regulation (EC) No 1995/2006 of 13 December 2006 and Council Regulation (EC) No. 1525/2007. In order for the

EU to continue financing its actions in an enlarged Europe, on the 17th of December 2007, the member state representatives and the head of the governments of the EU members reached an agreement on the financial perspectives for the period 2007-2013.

Today, Regulation (EU, Euratom) no. 966/2012 of the European Parliament and of the Council of 25 October 2012 on financial rules applicable to the general budget of the European Union is in force. In the present paper and in further analyse, we will refer to this normative act as a Financial Regulation.

2. LITERATURE REVIEW. MOTIVATION AND PURPOSE OF THE RESEARCH

Nowadays, one of the major challenges of the socio-economic development, especially in Romania, is ensuring the balanced and harmonious character by diminishing inter and intra-regional disparities, which should be assumed as a distinct objective of the regional policy of European inspiration. In this context, it becomes obvious that the central and local budget play a distinct and very important role in shaping and supporting economic development. Moreover, taking into consideration their attribute of local administrative autonomy, local public authorities have a right and obligation to exercise this role freely in agreement with the interest and preferences of local community members (Bilan *et al.*, 2016, p. 354).

In this complex regulatory context, the present paper aims at identifying the impact of the budgetary principles on the public authorities' activity during the budgetary procedure. The budget principles also influence the taxpayers conduct (Tofan, 2016) and there is no way to eliminate in this analysis the fiscal activity of the state and the impact on the taxpayers actions, but we just assume it will be addressed in further research.

The EU's budgetary principles are very similar to those applied to the state budget procedure, which is similar with the classic principles of financial law. However, the way the budget is adopted is a bit original and is marked by the EU's specificity, which is not a state or an international organization in the classical sense (Oberdorff, 2010, p. 277).

The European Commission has the task to start the budgetary procedure and to verify compliance with European law rules throughout the approval, execution and verification of budget implementation, but the role and the power of the committee in this procedure have been modified in the Lisbon Treaty (Masson, 2009, p. 33). In accordance with the fundamental principle of unity and the right to access of administrative documents, the obligation to record all the Union's revenue and expenditure operations in a single document guarantees the transparency of those operations, which must be assessed in a global and exhaustive manner (Neagu, 2008, p. 31). The principle of annual budget is traditionally presented in the literature (Saguna, 2002) and it refers to the

attachment of budgetary operations to an annual exercise in order to facilitate the control of the work of the European Executive.

The budgetary principles are addressed in the recent literature directly or, in many cases, using the indirect approach, as a result of investigating authority fiscal conduct. The fiscal responsibility is defined by reporting to those rules, regulations and procedures that influence the way budgetary policy is planned, approved, conducted and monitored, setting out three defining components with long-term impact, such are numerical fiscal rules, independent fiscal institutions and medium-term budgetary frameworks (Cavallo, Dallari, and Ribba, 2018). In line with above opinion, the main objective of fiscal responsibility should be achieved through sound budgetary positions, by removing the tendency to adopt unsustainable fiscal policies, leading to high deficits and debt growth, taking into account some mechanisms to reduce the pro-cyclicality of fiscal policies and to improve the efficiency of public spending (Evangelopoulos, 2018).

It is possible that contemporary issues will bring major challenges on the area of sustainability of public finances and these will include the reshaping of the regulatory framework for the budgetary principles, in accordance with their impact both on theoretical and jurisprudential level. This impact is our paper major interest, in order to conclude on the possibilities to improve the law in force for the budgetary procedure.

3. BUDGETARY PRINCIPLES ON THE EU'S CENTRAL BUDGET

Under Title II, Part I of the Financial Regulation, the EU general budget is drawn up and implemented in accordance with the following principles: the principle of unity and the principle of budgetary accuracy, the annual principle, the principle of balance, the principle of unity, the principle of universality, financial management and the principle of transparency.

3.1 The principle of unity and budget truth

The rule of the unity was initially regulated by art. 268 TEC, which states, "all Community revenues and expenditures relating to the same budget year shall be entered in the budget". This principle, enshrined in the specialized doctrine as both the principle of unity and budgetary truth, and the principle of budget accuracy, refers to the fact that all receipts and payments must be found in a single budget document in order to ensure an effective control of the conditions for the use of European resources. The budget must provide the necessary resources and authorize all revenue and expenditure, including the express provision that no revenue is collected and expenditures are approved unless it is recorded in a budget line.

Still, certain EU financial funds have a particular regime. There is the case with the European Development Fund (EDF), directly put up by contributions from Member States following a key criterion found in the GNP and the case of

the decentralized bodies of the EU (European agencies) which have their own budget and receive for most of them subsidies to the budget.

The EDF is funded by contributions from Member States. It is provided with an autonomous financial regime and is managed by a steering committee following specific procedures. The reason why the EDF interventions have not been entered into the general budget of the EU is political because the Member States do not want to make public the amounts allocated for helping the developing countries. Identifying the financial participation of each Member State would not be possible if all the grants were consolidated in the general budget of the Union (Brezeanu, 2007, p. 156).

The principle of budgetary unity involves including all EU revenue and expenditure information in a document (budget - Article I-53 of the Treaty establishing a Constitution for Europe) in order to allow a better appreciation of European finances in relation to the responsible institutions of their management. Still in line with this principle, the Council has added the principle of budgetary veracity, which requires the budgetary authority to provide only the credits that can actually be executed.

In fact, during the development of the EU, there was never a single budget, but a set of budgets. Under the name of the general budget, there are mainly two main categories:

- distinct budgets to cover general budget expenditure;
- annexed budgets (satellite budgets) of the EU general budget - are budgets established and implemented by some EU separate legal entities but closely linked to the union, as they are involved in the implementation of common policies.

This situation has not been interpreted as a distinction from the imperative nature of the principle of unity, since the idea of regulation is that all receipts and payments must be contained in a single budget document, in order to ensure effective control of the conditions for the use of European resources and does not concern a single budget per se. The existence of several budgets is justified by the fact that the revenues of the other budgets come from an activity registered in the general budget of the Union.

Under the provisions of Article 7 of the EU Financial Regulation - "The scope of the budget", the EU budget includes:

- the Union's revenue and expenditure, including the administrative expenditure of the institutions under the provisions of the TFEU relating to the common foreign and security policy, and the operational expenditure generated by the implementation of those provisions when these are carried out by the budget;
- revenue and expenditure of the European Atomic Energy Community.

At the same time, this article provides in par. (2) that the guarantees for lending and lending operations conducted by the Union, including under the

European Financial Stability Mechanism and the Financial Stability Facility for Member States' balances of payments, are included in the budget.

Regarding the principle of budgetary accuracy, the Financial Regulation provides in Art. 8 that revenue is not collected and expended in the EU budget unless it is recorded in a budget line; no expenditure may be committed or authorized against authorized appropriations and no credit may be entered in the budget unless it relates to an item of expenditure considered. This is a common provision in Romanian budgetary discipline too.

3.2 Principle of annual budget

This principle is enshrined in art. 9-16 of the Financial Regulation, which start the following regulation: "appropriations entered in the budget shall be authorized for the financial year beginning on 1 January and ending on 31 December."

The principle of annual budget refers to the fact that budget revenues and expenditures must be approved for the budget year, which corresponds to the calendar year, with some exceptions expressly regulated (Tofan, 2016). During the budget exercise, usually until July, a series of amending budget laws may intervene. The European Council also determined that the budgetary projections for each budget year must in fact fit into several multiannual forecasts, i.e. they should cover a period of three budget years (according to the European Commission's intervention).

If the annual rule is strictly complied with, all allocations not used during a budgetary exercise should be cancelled. However, action is often needed beyond the end of a calendar year. To provide an effective solution to this situation, Art. 271 TEC provides for the possibility of reporting on allocations that can only be used in the next financial year. In this case, the concept of disjoined credits, which break down into commitment appropriations and payment appropriations, may be used as follows:

- commitment appropriations cover, within one year, the total cost of the legal obligations contracted for shares, the realization of which extends over more than one year;
- payment appropriations cover, up to the amount entered in the budget, the payments resulting from the implementation of the commitments contracted during the year and / or previous years. They are subject to annual budgetary authorization (Brezeanu, 2007).

Derogations from the annual budget principle are covered by the credit transfer system, as follows:

- unused appropriations at the end of the year for which they are entered are, as a rule, cancelled; exceptionally, they may be carried over;

- non-disbursed appropriations corresponding to the legal commitments contracted at the end of the year are legally carried over to the following year;
- the affected receipts are subject to a statutory report, any surplus on the total of payments made during one year shall be carried over to the following year.

The budget crises that followed during the 1980s of the last century required the establishment of a mechanism to guarantee budgetary discipline in the longer term than a calendar year. Agenda 2000 has proposed multiannual financial programming tailored to the Union's new priorities. Since 1988, the Union's annual budget has been set in respect of the long-term financial framework ("financial perspectives"), which defines the annual expenditure ceiling.

The financial perspective is not only an indicative programming exercise but also the milestones agreed by the Member States and it becomes binding during the current period. To date, several financial perspectives have been developed, such as: the 1988-92 financial perspective (Delors I Package), the 1993-1999 Financial Perspective (Delors II Package), the Financial Perspective 2000-2006, the Financial Perspective 2007-2013.

In 1999, the Agenda 2000 negotiations adopted the future priorities of the Union, the financial perspectives for 7 years covering the period 2000-2006. This framework has set out the broad budgetary guidelines for several years by the European Parliament, which has made it easier to adopt the annual budget, which also needs the European Council's agreement, both of which are considered the EU's "budgetary authorities". On the other hand, the introduction of a multi-annual capping helps control the evolution of EU spending.

In the difficult EU context of 2005, marked by the rejection of the EU Constitution in France and the Netherlands, the rapid achievement of the Agreement on the Financial Perspective of the Union for the period 2007-2013 was an urgent need for political, budgetary and practical reasons.

The Inter-institutional Agreement of 17 May 2006 provided for a total amount of the Community budget for the period 2007-2013 of EUR 864.3 million, equivalent to 1.048% of the Member States' gross national income (Neagu, 2008, p. 49). In order to facilitate the absorption of the Structural and Cohesion Funds, the European Council established the introduction of flexibility arrangements for financial arrangements consisting in increasing the funding duration of a project from two to three years. In the literature, it is appreciated that since the financial forecasts have been approved over several years, the political interest of the annual budgetary process has declined (Varela, 2008, p. 74).

As shown in the literature, the multiannual budgetary strategy is in accordance with the coordinates of fiscal consolidation strategies. Countries with large public debts and high negative budget balance were forced to operate more

severe adjustments, often under the pressure of commitments to the international financial institutions, like IMF and European Commission (Bilan, 2017).

3.3 The principle of budget balance

Article 17.1 of the EU Financial Regulation states that "revenue and payment appropriations are balanced", reformulating the principle that was initially stated in Art. 267 ECT, namely "the budget must be balanced in terms of revenue and expenditure". According to art. 17 par. 2 of the Regulation, the Union and its bodies can not make loans within the budget, which have the same amount for receipts and payments. In other words, the EU and its institutions are not authorized to use a loan to cover the expenditure, and when the execution of the budget is completed, there must be an exact balance between the receipts and payments (Saguna and Tofan, 2010).

This principle implies the achievement of the equivalence between revenue level and budget expenditure. As a consequence of this principle, the draft EU budget must be subject to approval in a perfectly balanced way. In the case of the budget deficit, it is forbidden to balance the budget through loans. If a budget surplus is recorded, it must be included in the budget for the following budget year. It is an important difference from the national execution procedure, in which case the deficit is the usual case.

In practice, the EU general budget respects a strict balance in spending authorization, but revenue may be higher or lower than spending on budget execution. Budget is, by definition, a forward-looking plan, both for receipts and payments. It is therefore quite likely that execution deviates from the estimated project, two possible situations being possible:

- the balance is positive (budget surplus) is the most common situation with regard to the EU budget. The surplus is credited to the next year's account and duly reduces the call for funds provided by the Member States;
- the balance is negative (budget deficit). In this rather exceptional situation, there will be a payment to the budget account for the following year (Firtescu, 2017).

According to art. 18, the balance of each financial year shall be entered in the budget of the following financial year as revenue in the case of a surplus or as a payment for a deficit. Estimates of revenue or payment appropriations shall be entered in the budget during the budgetary procedure and by a letter of amendment. After presentation of the provisional accounts for each financial year, any differences between those accounts and estimates shall be entered in the budget for the following financial year by means of an amending budget exclusively devoted to these differences. In this case, the Commission shall present the draft, amending budget simultaneously to the European Parliament and to the Council within 15 days of the presentation of the provisional accounts.

Economists have identified a mechanism to fund new payments, anticipating the savings that will be made during the ongoing financial endeavour. This is a negative reserve: a negative amount is entered in the budget and will have to be covered during the year by surpluses from surplus chapters (Brezeanu, 2007, p. 157).

This is the moment to emphasize that the budget balance is to be respected for the general budget and for regional/local budgets simultaneously. To insure this, both at the EU level and in the OCDE guidelines were mentioned some models to split the financial resources for each level of governance, like:

- central level, which includes all the institutions and state agencies with national spread activity;
- regional level, for federal states and for administrative-territorial units with activities at a lower level than central authorities;
- local/municipal level;
- supra-national level authorities with budgetary responsibility (Onet, 2014, p. 325).
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3.4 Account unit principle

Since the 1st of January 1999, the EU budget has been drawn up in euro. Article 19 of the EU Financial Regulation establishes that the budget is to be drawn up and implemented in euro and that the accounts are presented in euro.

The use of the euro is regulated as an absolute principle, i.e. budgeting, re-accounting and budgeting. Only exceptions are allowed for the authorization of operations in another currency for treasury bills considered as accountable accounting and for pre-emptive bills (whose budgetary adjustment is made in euro). In these regulated and explicitly regulated situations, the authorizing officer responsible is authorized to carry out operations in national currency in accordance with the rules of the Implementing Regulation. The Commission is empowered to adopt acts for the establishment of detailed rules on the conversion between the euro and other currencies.

At national level, the unit principle is respected with regards to the national money. The payments due in other money than national currency needs to be authorised by the national bank or the equivalent institution (Gherghina, 2011, p. 349).

3.5 The principle of universality

As with internal financial law, the principle of budgetary universality means that a certain revenue is not assigned to support certain expenditure (the rule of not allocating revenue and expenditure) and that there are no constraints between revenue and expenditure.

The principle of budgetary universality in the European financial law is regulated in art. 20 and the following of the Financial Regulation. It means that

the budget resources are to be used for financing all the payments without distinction, all revenues are in a common mass, over which the expenditure can be charged or, in particular, all revenue and expenditure are recorded in full budget, without being compensated. This principle involves two distinct rules of budget law, non-compliance and non-contracting. So,

- the non-revenue rule, according to which own revenues are used to provide non-discriminatory financing of all expenditure included in the budget;
- the rule prohibiting the contracting of income and expenditure, i.e. the prohibition to set out incomes and out-of-budget expenditure.

Non-revenue rule states that budget receipts should not be for precise payments. However, exceptions to the rule are tolerated, for example for contributions from Member States to some research funds.

The non-contracting rule states that there can be no contracting operations between receipts and payments. Only technical exceptions allowing the postponement of the procedure are admissible, such as the gap between the time when the loans are contracted and the time of payment.

By way of exception to the principle of universality, art. 21 of the Financial Regulation establishes categories of external assigned revenue and assigned revenue, which is used to finance specific expenditures. For example, there are external assigned revenues:

- Member States' financial contributions to research programs;
- Financial contributions to certain external assistance projects or programs financed by the Union and managed by the Commission on their behalf,
- Interest on deposits and fines provided for in the Regulation on speeding up and clarifying the application of the excessive deficit procedure;
- Assigned revenue for a specific purpose (income from foundations, subsidies, donations and inheritances, including assigned revenue specific to each institution;

Internal assigned revenue:

- Revenue from third parties for the supply of goods, services or works at their request;
- Proceeds from the sale of vehicles, equipment, plant, scientific and technical equipment and materials, replaced or cancelled after full depreciation of their carrying amount;
- Revenue obtained from the reimbursement of undue payments;
- Proceeds from interest on pre-financing payments;
- Receipts from the supply of goods, services or works to other departments within an institution, institution or body, including delegation allowances paid on behalf of other institutions or bodies and reimbursed by them;

- Insurance payments received;
- Rental income;
- Revenue from the sale of publications and films, including those on electronic media.

Also, as a consequence of the principle of universality, it is the Commission that can accept any act free of charge in favour of the Communities, such as donations, subsidies, gifts and inheritances. However, acceptance of donations amounting to EUR 50 000 or more, involving a financial charge, including monitoring costs exceeding 10% of the amount of the donation granted, shall be subject to approval by the European Parliament and the Council, which shall take a decision in this regard 2 months after receipt of the request from the commission. If no objection has been made within this time limit, the Commission shall take a final decision on the acceptance.

3.6 The principle of specialty (specificity)

Article 271.3 TEC provides that "allocations of funds shall be broken down into chapters classifying expenditure by nature or purpose and divided as necessary". The allocation of funding allocations guarantees budgetary authorities that the authorization of expenditure will be made in accordance with the purpose for which they were intended.

Article 26 of the EU Financial Regulation stipulates that all appropriations must be entirely allocated to specific destinations, titles and chapters and chapters are divided into articles and headings.

The principle of budget specificity (or specificity) implies that each item of expenditure must have a precise destination and it can be affected for a certain purpose, with the intention of avoiding any confusion between the different costs in authorization and execution. No payment can be affected except by charging an article in the budget. Receipts must also be identified with precision. Every major transfer has to be authorized by the budgetary authority, in accordance with the rules laid down in the Financial Regulation. The procedure for making such transfers shall begin three weeks before any transfer takes place when the institution informs the European Parliament and the Council of its intentions. Any institution, with the exception of the Commission, may propose to the European Parliament and the Council, within its own section of the budget, transfers from one title to another, exceeding the limit of 10% of the appropriations for the financial year for the budget line from which the transfer is to be made. As regards transfers within the articles in the budget section, the institutions should not inform the European Parliament or the Council (Bercu and Tofan, 2018, p. 135).

In accordance with the Financial Regulation, any institution other than the Commission may, within its own section of the budget, carry out credit transfers as follows:

- From one title to another, up to a limit of 10% of the expenditure for the financial year indicated on a line on which the transfer is made;
- From one chapter to another and from one article to another, unlimited.

The Financial Regulation states that budget revenues and expenditures are recorded and approved in the source and destination budgets. The budget classification should include smaller units (titles, chapters, articles and paragraphs) so that each of the budget units has its own identity but also provides the Community institutions with some flexibility in managing the funds.

Within its own section of the budget, the Commission may carry out transfers of appropriations from one title to another provided that it immediately informs the European Parliament and the Council of the decision taken in the following situations:

- The transfer of appropriations under the heading "provisions";
- In exceptional cases, for example catastrophes and international humanitarian crises, when transfers are made for crisis management and humanitarian aid operations.

3.7 The principle of sound financial management

Article 274.1 TEC requires Commission to respect the principle of sound financial management in the execution of the European budget. Although this principle is not expressly provided for in the domestic law of several countries and is implicitly regulated, the European legislature has been more cautious and has explicitly provided for this rule by means of a valuable text with a primary source of European law, namely Treaty establishing the European Economic Community (Bercu and Tofan, 2018).

Moreover, this principle has been detailed in the EU Financial Regulation. According to art. 30 of the Regulation, the principle of sound financial management is closely related to three other principles, the principle of economy, the principle of efficiency and the principle of effectiveness. The principle of economy requires that the resources used by the institution to carry out its activities be made available in a timely manner, in the appropriate quantity and quality and at the best price.

The principle of efficiency aims at the best ratio between the resources used and the results obtained. The principle of effectiveness is aimed at achieving the specific objectives set and achieving the expected results.

The principle of sound financial management, as a sum of the other three principles detailed above, aims to establish specific, measurable, achievable, relevant and dated objectives monitored through performance indicators for each activity.

The budget shall be implemented on the basis of effective and efficient internal control, consistent with each management mode and in accordance with relevant areal regulations, to ensure that the following objectives are met:

- The effectiveness, efficiency and economy of operations;
- Reliability of information;
- The protection of assets and information;
- Preventing and detecting fraud and irregularities;
- The adequate risk management of the legality and regularity of secondary transactions, taking into account the multiannual nature of the programs and the nature of the payments concerned.

The EU Financial Regulation characterizes the principle of sound financial management by reference to the principles of economy, efficiency and effectiveness. Its translation into practice is about defining verifiable targets, tracked through measurable indicators. This is how the switch from a resource-driven management to result-oriented management. Within this framework, the notion of monitoring during the implementation of a program (ex ante, in the course of execution and ex post) becomes the main activity.

The principle of sound financial management involves the idea of an organized and correlated financial system in relation to the principles of the economy. Financial resources must be available in a timely manner and in the amounts needed for each action. The optimal balance between the means used and the results obtained appreciates the efficiency of the financial system, and the measurement of effectiveness requires the achievement of the fixed objectives and the achievement of the established results. In particular, the application of this principle requires the setting of performance indicators, which are transmitted to the competent budgetary authorities. Still, as shown in the literature, the soundness of the budget may not be reached with all cost, but in accordance with the respect of the right of the taxpayers (Costas, 2016).

3.8 The principle of transparency

In the EU law, the fundamental principle of transparency is set out in art. 15 par. 3 of the Lisbon Treaty, according to which any citizen of the Union, and any natural or legal person residing or having its registered office in a Member state, shall have the right of access to documents of the Union institutions, bodies, offices and agencies, whatever their medium, subject to the principles and the conditions to be defined in accordance with this paragraph. It is shown in the literature that art. 15 par. 3 of the TFEU is a framework provision. It sets out a principle of a right of access to EU documents and of transparency of procedures; however, the modalities are to be set out in secondary legislation (Chalmers, Davies and Monti, 2010, p. 385).

The Financial Regulation formally recognizes this principle for the entire budgetary exercise, as expressly stated in the Art. 34 et seq. Transparency is ensured by establishing budgetary and amending budget obligations in the final form in which they were adopted, at the request of the President of the European

Parliament, in the Official Journal of the European Union. The budget shall be published within three months of the date on which it is finally adopted.

The obligation to publish exists also for the consolidated annual accounts and for the report on budgetary and financial management prepared by each institution.

Information on borrowing and credit operations contracted by the EU to third parties is included in an annex to the budget, which is also public (Article 35 of the EU Financial Regulation).

The principle of transparency for the European budget corresponds to the principle of publicity in national budgetary law and requires all open-minded, transparent and transparent "open-ended" budgetary activities (Saguna and Tofan, 2010, p. 126). This is done by making publicly available (through the publication in the Official Journal of the EU) of the EU budget and of all the corrections made, the financial management reports established for each institution.

4. THE RELEVANCE OF THE BUDGETARY PRINCIPLES IN NATIONAL JURISPRUDENCE

The budgetary principles are not only theoretical concepts, but they also have impact on the present jurisprudence, both at national and at EU level. We have to say from the very beginning that in Romanian jurisprudence, there is few cases solved on the bases of the budgetary principles effects, mainly referring to the public procurement procedures. The legal system is still traditionally shaped and the most of the litigations are in accordance with the civil or penal regulation. In the last decade, after the Romanian accession to the EU, the number of cases concerning administrative, fiscal and budgetary regulation has increased.

In order to illustrate this, we have addressed the jurisprudence of the Romanian High Court of Cassation and Justice (HCCJ) and we have investigated the information available on the institution web page (HCCJ, 2018), concerning the number of the relevant cases for the influence of the budgetary principles in domestic jurisprudence. The results of the research are presented in Table 1.

Table 1. HCCJ case-law on budgetary principles after 2007

Year of pronouncing the solution	Number of cases	Competent HCCJ section to solve the litigation
2007	0	N/A
2008	4	1 civil
2009	1	1 administrative contentious
2010	8	8 administrative contentious
2011	32	16 civil, 4 penal, 1 law interpretation, 15 administrative contentious

Year of pronouncing the solution	Number of cases	Competent HCCJ section to solve the litigation
2012	22	3 civil, 4 penal, 1 law interpretation, 1 conflicts of law, 13 administrative contentious
2013	10	1 civil, 2 law interpretation, 7 administrative contentious
2014	12	3 civil, 4 penal, 5 administrative contentious
2015	21	2 civil, 3 law interpretation, 16 administrative contentious
2016	18	3 penal, 1 civil, 1 conflicts of law, 3 law interpretation, 10 administrative contentious
2017	22	1 penal, 1 civil, 4 law interpretation, 16 administrative contentious
2018	1 (partial result, at the middle of the year)	administrative contentious

Source: own elaboration based on the information available at HCCJ website in May 2018

We have to consider that the traditional system of law implies that civil and penal cases are preponderant and the mission of the HCCJ is mainly to ensure the uniform interpretation of law. In this status quo, it is notable for the last decade, since the Romania is a member of the EU, the increasing number of solved cases in the area of administrative contentious. The administrative contentious is the type of section in Romanian courts that is responsible for solving the matters that are influenced by the compliance with the budgetary principles.

The analysis of the Romanian courts jurisprudence with impact on the budgetary principles shows a relatively high interest for the prevention and sanction of the budgetary fraud, both on national and EU funds (Bufan and Stefanescu, 2018, p. 48). As shown in the literature, the selection criteria are the most often criticised by the court when analysing the public procurement contracts (Tofan, 2011, p. 640). There are cases also for protecting the legal character for the expenditure of the EU budget, usually in connection with an acquisition procedure.

5. THE EUROPEAN COURT OF JUSTICE REFERENCES TO THE BUDGETARY PRINCIPLES

Romanian literature persistently showed that, in the context of being an EU member state, there is no need to treat in separate section the national jurisprudence and the EUCJ case-law (Paun, 2018, p. 87). Differently from international treaties, the EU's institutional treaties have created a new and specific legal order that is integrated into the legal order of the Member States. This integration is organised by the EUCJ from the beginning of the European project and it is supported by the priority and the direct effect of the EU regulation (Berramdane and Rossetto, 2010, p. 395).

Still, being a relatively recent member of the EU, Romania has to adapt to the mechanism of priority of the EU law over the national prevision, when the conflict of law is present. The EUCJ jurisprudence is important for the judicial practicing and for the administrative authorities' personnel.

For these reasons, we extended our analysis to the EUCJ case-law after 2007, looking out for cases solved by the European court. Searching engine of the EUCJ available on-line was interrogated for revealing the cases where budgetary principles were involved.

Table 2. EUCJ case-law on budgetary principles after 2007

Search criterion	Number of documents
Budgetary principles	1167
Principle of Unity and Budget Truth	9
Principle of annual budget	2
The Principle of budget Balance	799
Account Unit Principle	2371
The principle of universality	55
The principle of specialty (specificity)	1
The principle of sound financial management	895
The principle of transparency	2403

Source: own elaboration based on the information available on EUCJ website in May 2018

It is evident from the literature review section that several studies focus exclusively on the studying the link between budget responsibility and fiscal discipline in local debts management, most of these studies rather insist on the aspects proceeding the principles in question, emphasizing the implication of social elements, the effects and less the cause of the problem (Gavriluta, Onofrei, and Cigu, 2017, p. 58).

It is the same, the research on the information available for the jurisprudence (EUR-Lex, 2018) showed 1167 documents containing this phrase, after 2007, including court judgments, advocate conclusions and separate opinion. Speaking about numbers, we observe the huge difference in scale between the number of

results on EUCJ and Romanian court (HCCJ). The scale is not respected for any criterion of comparison (population, GDP or simply by the 1 to 28 member states) so we have to conclude on the few numbers of cases presented in the front of Romanian courts for solving the litigation concerning the respect of the budgetary principles.

It is, in our opinion, the results of the young democracy Romania is experiencing and the lack of practice in exercising the right competence for the courts of law.

6. CONCLUDING REMARKS

The influence of principle of law is important both on theory and in practice. In this line, the budgetary principles make no exception and the specificity of the EU construction is proved in this area of investigation too.

Although there are categories of priorities set at a multiannual level, the European budget is not a multi-year budget, as long as the annual budgetary procedure continues to be mandatory, strictly setting the expenditure level and setting it by chapter. In the case of new contingencies, the financial perspective may be adjusted, although the limit set by the multiannual budget cannot be exceeded.

In Romanian jurisprudence, there are few cases solved on the bases of the budgetary principles effects, mainly referring to the public procurement procedures. The national legal system is still traditionally shaped and the most of the litigations are in accordance with the civil or penal regulation. In the last decade, after the Romanian accession to the EU, the number of cases concerning administrative, fiscal and budgetary regulation has increased, but it is still significantly low, in comparison to the EUCJ case-law in the field.

References

1) Bercu, A.M. and Tofan, M. (2018). *The European Regional Competitivity and Human Resources Development. Theoretical Fundaments and Good Practice*. Iasi: Alexandru Ioan Cuza University Publishing House.
2) Berramdane, A. and Rossetto, J. (2010). *Cours – Droit de lÚnion Europeenne*. Paris: Montchrestien, Lextenso editions.
3) Brezeanu, P. (2007). *European Finance*. Bucuresti: C.H. Beck Publishing House.
4) Bilan, I. (2017). Fiscal Consolidation as Alternative Public Debts Reduction Strategy in the EU Member States. In: *The Proceedings of the International Conference on European Financial Regulation – EUFIRE 2017*. Iasi: Alexandru Iona Cuza University Publishing House, pp. 40-53.
5) Bilan, I., Oprea, F., Cigu, E. and Toderascu (Sandu), C. (2016). Local Government Expenditure and Economic Groth: the Evidence of Romanian Counties. *Transformations in Business & Economics*, 15(39C), pp. 352-376.
6) Bufan, R. and Stefanescu, T.M. (2018). The Concept of Justifying Document from the Perspective of Tax Law. *Cluj Tax Forum Journal*, 1(1).

7) Cavallo, A., Dallari, P. and Ribba, A. (2018). The Common Framework for National Fiscal Policies and the Euro Area Fiscal Union. In: *Fiscal Policies in High Debt Euro-Area Countries.* Cham: Springer, pp. 11-49.
8) Chalmers, D., Davies, G. and Monti, G. (2010). *European Unio Law.* 2nd ed. New York: Cambridge University Press.
9) Costas, C.F. (2016). *Tax Law – according to the tax code 2016.* Bucuresti: Universitul Juridic Publishing House.
10) De Quadros, F. and Sidjanski, D. (2017). *The Future of Europe: The Reform of the Eurozone and The Deeepening of the Political Union.* Lisboa: AAFDL.
11) EUR-Lex, (2018). *Access to the European Union Law.* [online] Available at: https://eur-lex.europa.eu/homepage.html [Accessed 10.05.2018].
12) Evangelopoulos, P. (2018). The Restoration of Fiscal Stability. A Public Choice Approach on the Problem of Public Debt. *Theoretical Economics Letters,* 2(5), pp. 147-158.
13) Firtescu, B.N. (2017). *European Union Public Finance.* 2nd ed. Iasi: Tehnopress Publishing House.
14) Gavriluta (Vatamanu), A.F., Onofrei, M. and Cigu, E. (2017). Budget Responsability and Fiscal Discipline in Local Debt Management. In: *The Proceedings of the International Conference on European Financial Regulation – EUFIRE 2017* Iasi: Alexandru Iona Cuza University Publishing House, pp. 53-64.
15) Gherghina, S. (2011). *Public Guarantees. - Regulations. Boundary. Applications.* Bucuresti: C.H.Beck Publishing House.
16) Masson, A. (2009). *Droit communautaire – Droit institutionnel et droit materiel. Theorie, exercices et elements de methodologie.* Bruxelles: Group De Boeck.
17) Neagu, N. (2008). *The Fraud in the European Comunity Budget.* Bucuresti: Wolters Kluwer.
18) Oberdorff, H. (2010). *L'Union Europeenne.* Grenoble: Press universitaire de Grenoble.
19) Onet, C. (2014). Financial Decentralization in the Context of Regionalization. In: *Public Administration – between mission and budgetary constraints. Juridical and managerial dimensions.* Bucuresti: Wolters Kluwer Publishing House.
20) Paun, C. (2018). The Reform of the Romanian Tax Law in the Context of the Recent Jurisprudence of the European Union Court of Justice. *Cluj Tax Forum Journal,* 1(1).
21) Popescu, A.I., Tofan, M. and Bercu, A.M. (2013). *Business Law.* Iasi: Alexandru Ioan Cuza University of Iasi.
22) Romanian High Court of Cassation and Justice (HCCJ), (2018). *HCCJ's Official Website.* [online] Available at: www.scj.ro [Accessed 03.05.2018].
23) Saguna, D.D. (2002). *Treaty of Financial and Fiscal Law.* Bucuresti: All Beck Publishing House.
24) Saguna, D.D., Tofan, M., (2010). *European Financial and Fiscal Law,* Bucuresti: C.H. Beck Publishing House.
25) Tofan, M. (2011). A View on Legal Procedure for Issuing Public Procurement Contracts. *Transformations in Business&Economics,* 10(2B), pp. 631-646.
26) Tofan, M. (2016). *Tax Law.* Bucuresti: C.H. Beck Publishing House.
27) Varela, D. (2008). *The Governance of The European Union,* Bucuresti: European Institute Publishing House.

Section II

EU FINANCIAL AND BANKING REGULATION

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COMPETITION AND INNOVATION IN BANKING SECTOR

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Abstract
The current paper provides new insights on the relationship between innovation and competition in 20 European banking sectors. The measures for financial novelties, Financial R&D Intensity (Value Added) and Financial R&D Intensity (Cost), are preferable to other indicators available in the literature since they account for the overall innovation. Moreover, Analytical Business Enterprise Research and Development (ANBERD) database provides accurate and internationally comparable information on enterprise R&D expenditures for several industries and timeframes. During 1999-2013, financial innovation grows, especially in Eurozone. Lerner index, adjusted Lerner and Boone indicator represent relevant measures of competitiveness. For the timeframe under scrutiny, there is a drop in competition along with significant variations among countries and across years. As a matter of fact, the changes in competitiveness follow the pattern of general business cycles. The methodology consists in two-step difference and system General Method of Moments and solves endogeneity and heteroscedasticity issues. The hypotheses on the U-shaped curve between competition and innovation and negative impact of financial crisis hold.

Keywords: *financial innovation; financial R&D intensity; bank competition; financial crisis; bank concentration.*
JEL Classification: D21, G21, G28, O30, F36, L10

1. INTRODUCTION

The purpose of the current paper is to examine the relationship between competition and innovation in European banking sectors. Former studies focus primarily on the connection between competition and innovation in manufacturing industry and product innovation in United States or United Kingdom.

Recently financial services and process innovation receive more attention since even if there is no argument that can support the idea of level of competition having different influences across industries, important financial innovations occur during the last two decades. Banks increase their efficiency of the delivery of financial services and quality and variety of financial products due to innovation. Therefore, this research fills the gap that exists in the literature and is valuable for both policymakers and decision makers. The existing studies reflect two opposite perspectives on the link betwixt innovation and competition. The former belongs Schumpeter who asserts that increasing competition erodes monopolistic rents which are beneficial to a successful innovator. The reason behind is lower incentives to invest in R&D activities that in turn put a break on future technological progress and economic growth.

Consequently, the combination of positive resource allocation effect and the negative profit incentive effect results in an inverse U-shaped relationship between the product market competition and the aggregate productivity growth. At the beginning, when the level of competition is modest, higher PMC stimulates growth as it eases a more appropriate use of resources, without restricting too much the enticements to innovate. Resource allocation impact dominates the profit incentive effect and generates a positive correlation competition and growth. On the contrary, once PMC is tough enough, greater competition lowers substantially technological progress and enhances marginally resource allocation for different economic activities. Profit incentive impact is stronger than the resource allocation effect and leads to a negative correlation between growth and competition. Different studies find an inverted U-pattern relationship between competition and innovation partly support both approaches. Moreover, Aghion and Griffith (2005) try to make a reconciliation between what theory says and what happens in practice. Their solution consists in a model that not only accounts for the U-inverted link between competition and innovation, but also includes an escape competition effect that initially prevails until competition is sufficient enough.

This paper contributes to the literature in three ways. First, improved indicators for the financial innovation and competition are part of the study. *Financial R&D Intensity (Value Added)* and *Financial R&D Intensity (Cost)* enable the assessment of the overall innovation degree of banking sectors in several countries. At the same time, Lerner index, adjusted Lerner index and Boone indicator provide more insights on the market power of financial

institutions from Europe. Secondly, the effects of financial novelties and their impact on competition in certain European banking industries has been not analyzed into detail until now. Previously only states such as Italy, United Kingdom or Belgium and shorter periods of time present interest.

Hence, it is worth examining what impact the competition has on innovation in several European states. Additionally, comparisons among Eurozone countries and the others facilitate understanding of the outcomes of additional regulations on financial innovative actions and competitiveness. The timeframe 1999-2013 is more extensive in comparison to last researches and enables the investigation of the consequences of the financial crisis on competition and innovation. Lastly, system GMM technique proves that the results are robust. This method is suitable for dynamic data panels and solves the endogeneity problem that characterizes the link between innovation and competition.

The main findings are the inverted- U relationship between innovation and competition and the negative effects of the recent financial turmoil. Overall, financial innovation increases across the entire sample, with more efforts coming from Eurozone. As for competition, the market power improves in general.

2. LITERATURE REVIEW

Schumpeter (1950) is the first researcher who proposes a theory on the activities bringing about sustainable economic growth in capitalist countries. Entrepreneurial innovations represent the key drivers of economic development since companies must look for technological improvements, better ways of doing business and other advantages because competition puts pressure on profits and overall performance level. New products grant enterprises a short-term monopoly as they attract competitors' customers and provide substantial gains. Being valued by the buyers, makes the successful product be imitated by other firms in the industry and lose its profit margins. These findings hold for manufacturing companies and take into consideration only one source of innovation, namely the new innovative products. Consequently, this model should be extended and adjusted for financial services and include innovations on marketing and organizational structures. At the same time, the main assumptions should be tested using real data on European banks.

Aghion and Griffith (2005) find that the U-inverted relationship between innovation and competition holds for U.K. manufacturing firms. Their major assumption suggests that competition discourages laggard firms from innovating while motivating neck-and-neck firms to introduce new products or services. The empirical measure of competition consists in a monotonically increasing function of its theoretical measure whereas the expected technological gap in an industry increases with product market competition. As proxy for innovation two indicators are used and therefore, two methodological approaches are proposed. The former is the number of patents on average at the industry level, weighting

each patent by the number of times it is mentioned by another patent. To account for the heterogeneous value of patents, Poisson regression is proposed. The latter is a measure of the overall innovation degree and is called technology gap. This indicator equals the average distance to the total factor productivity frontier firm across all firms in the industry-year and is modelled by linear regression. Hence, patents are not good proxies for financial innovations since not all novelties produced by the banks are officially registered and financial institutions are most of the time end users of several technologies developed by other industries. Moreover, at the European level figures on patents issued by different firms are not always available. As for technology gap, Bos, Kolari and van Lamoen (2013) come up with innovation measured through changes in the technology gap and conclude that there is an inverted U-shape relationship between competition and innovation in the U.S. banking industry. Differences between technology available today and optimal technology are calculated for the entire period and take values between zero and one. Stochastic Frontier Analysis (SFA) estimates the minimum cost frontier available yearly and envelops the annual cost frontiers to derive a meta frontier. The usage of SFA is preferable as it takes into account efficiency as well.

The new method of measuring innovation seems to be more appropriate than the one using patents, credit scoring, ATMs, new types of financial securities or Internet banking since it focuses on the overall innovation level of the financial institutions. Unobserved heterogeneity is removed by first differences whereas two-step efficient generalized method of moments estimator solves the endogeneity problem that characterizes the relationship between competition and innovation. Potential difficulties related to the model developed by Bos, Kolari and van Lamoen (2013) are lack of data along with complexity of the computations.

Recently, two new ways on measuring financial innovation emerge. Laeven, Levine and Michalopoulos (2015) apply cross sectional regression and panel GMM estimation and try to find whether financial innovation enhances economic growth taking into account factors as costs, entrepreneurial innovation rate or world technology frontier. The annual growth rate of domestic credit to private sector (% of GDP) represents financial innovation. The first argument for the choice is that the measure always stands for a proxy for the level of financial development and it seems logical to consider the growth rate of financial development as an indicator of the development in banking sector. Likewise, a 35-year timeframe makes the ratio of credit to GDP a reliable measure for the improvement rate in the financial system. Finally, the suggested proxy does not include any influences of credit to the government or public enterprises and shows only the advancements in banking system. Withal, the proposed rate measures no specific financial innovation.

Rossignoli and Arnaboldi (2009) determine and provide empirical evidence on the presence the financial innovation based on a sample of 35 listed Italian and British banks during 2005-2007. The first step of their methodology is the review of the financial statements of the banks in an attempt to identify either specific organizational units or reference to R&D activities. Also, innovations are assigned to six categories. The acquisition of asset management company, leasing activities through subsidiaries/ organizational units, or the establishment of new legally autonomous divisions group are examples of innovative changes of organizational model. When the innovative organizational adjustments do not affect the group as a whole, the novelties belong to another category called organizational structure. The innovations in processes and internal controls refer to operating systems, whereas the focused on technological content pertain to ICT. If technology is easily identifiable and prevailing in a certain innovation, then the novelty is categorized as delivery channel while a new mortgage or home banking functionality belongs to product type of innovation. Nonetheless, as Arnaboldi and Rossignoli (2015) admit, even if the methods used are simple they are not so reliable for the measurement of financial innovation. Also, it is challenging to apply this procedure to a large sample of banks for a long period of time, due to potential unavailability of data needed and time constraints.

As for competition measures, several proposals need closer consideration. Lerner index or price cost margin accounts for competition since they provide much more information on the firms' characteristics and compared to Herfindahl-Hirschman index, it does not demand exact definitions of geographic and product markets and it differentiates among small and large countries. The main disadvantages of price cost margin remain endogeneity since it changes only if there are variations in the firms' costs and the lack of solid theoretical foundation as Boone (2008) remarks. At the same time, the specific input on prices and costs for the banks' products needed in the computation of Lerner index, cannot be easily obtained. The possible solutions are relative profit differences, Panzar- Rosse model and Boone indicator. The first potential indicator for competition is difficult to be implemented using real data. Meanwhile, the index developed by Panzar and Rosse (1987) is concerned more with the competitiveness of all activities performed by banking sector as a whole. Additionally, Bikker, Shaffer and Spierdijk (2012) prove mathematically and empirically, based on a sample of 18,000 banks in 67 countries during 1986-2004, that Panzar-Rosse price function or scaled revenue equation is not a good measure of competition. Instead an unscaled revenue equation should be used. In this case, Panzar- Rosse H-statistic must include information on cost, market equilibrium and market demand elasticity. Though, these facts should be estimated since most of the time they are not ready for use.

Van Leuvensteijn *et al.* (2011) introduce the Boone indicator to measure the competition level for the banking sectors of five major European countries along

with U.K., U.S. and Japan and identify several caveats of this index as well. Financial institutions share partially their profits with the clients. Further, design, product quality and effectiveness do not result in any differentiations among innovations. To eliminate these flaws, Van Leuvensteijn recommends a different computational approach. Instead of using average variable costs, marginal costs are determined. Besides, market shares replace profits. As for results, over the period 1994-2004 the U.S. is the most competitive in terms of loan market. In Europe Germany and Spain come first, while the Netherlands is on a more intermediate position. In Italy there is a significant decline in competition. Less competition occurs in the French, Japanese and UK loan markets. In Germany and U.S. commercial banks are more competitive than savings and cooperative banks.

Carbo *et. al* (2009) attempt to conduct a more thorough analysis by using several measures for innovation, namely H-statistic and Lerner index. The values of these indicators are interpreted in relationship with the outcomes of Hirschman–Herfindahl index, total asset ratio and return on assets. The sample includes Austria, Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden, United Kingdom. Competition measures record different outcomes over 1995-2001. According to net interest margin, Luxembourg and Ireland are the most competitive. Lerner index shows that Luxembourg and United Kingdom register the highest level of competition. Luxembourg and Portugal have the most competitive banking sectors as H-statistic shows. Germany and Luxembourg are the best competitive judging by Hirschman–Herfindahl index. Overall, Luxembourg comes first regarding competition due to the fact that it represents an offshore financial center and its banking sector encompasses many international financial institutions. The inclusion of country specific factors ensures more reliable outcomes.

Several papers deal with the nature of the relationship between competition and innovation. Berger, Hanweck and Humphrey (1987) indicate based on information about 3,800 US commercial banks during 1971–1979, that ATM adoption is positively influenced by the size of the bank, market concentration and membership in a bank holding company and the Schumpeter's hypothesis holds. Yet, bivariate and multivariate logit analyses on how the competition influences 1,600 U.S. commercial banks to implement internet banking, show opposite results. Small banks implement internet banking only after large banks make this move and commit funds in this direction. Furthermore, several theories on the relationship between competition and innovation are stated. Uncertainty on new laws and regulations, inflation, international events and technology speed up financial innovations. Universal banks, a combination of investment and commercial banks innovate less than functionally-separated financial institutions since securities innovations have adverse spill-over effects on the profits (Wheelock and Wilson, 1999). Still, big universal banks have a

significant power to lobby for specific regulations that facilitate financial innovations which are profitable (Boot and Thakor, 1997). On the contrary, Bhattacharyya and Nanda (2000) claim that large banks innovate more since the returns they might obtain are significant given their market share. Small banks take an innovation as long as it may squeeze a certain number of clients of the large banks (Hauswald and Marquez, 2006). Further, if financial innovations improve information processing less competition arises in banking industry (Mariotto and Verdier, 2015). However, once technology facilitates information dissemination, banks have to put much effort in attracting new clients and preserving the existing ones.

All in all, there is a variety of theoretical studies that have suggested different relationships between innovation and competition in financial services. So, they are concerned with one particular innovation and not with the total innovation generated by banks. The cause of this situation is that no measure of overall innovation has been defined and used. As a matter of fact, the current research attempts to contribute to the literature by the proposal and estimation of a consistent cross-country measure of financial innovation and competition. In addition, assessments of innovativeness and competition of twenty European countries prior and after the financial crisis are derived.

3. DATA AND METHODOLOGY

The timeframe under analysis is 1999-2013. Twenty European countries are part of the study. The model from this research is in accordance with Bos, Kolari and van Lamoen (2013):

$$Innovation_{it} = \beta_1 C_{it} + \beta_2 C_{it}^2 + \gamma' Z_{it} + a_i + \varepsilon_{it} \quad (1)$$

where the dependent variable is innovation, competition plays the role of independent variable, γ' stands for a $1 \times n$ parameter vector, Z_{it} represents an $n \times 1$ vector of control variables, a_i accounts for unobserved heterogeneity and ε_{it} is the error term. The squared competition variable expresses the U-curve that describes the relationship between competition and innovation as Aghion and Griffith (2005) suggest. Differencing is helpful as it eliminates the trend component of the time series and unobservable heterogeneity that remains constant. The resulting model is the following:

$$\Delta Innovation_{it} = \beta_1 \Delta C_{it} + \beta_2 \Delta C_{it}^2 + \gamma' \Delta Z_{it} + \Delta \varepsilon_{it} \quad (2)$$

Competition is endogenous because of the reverse causality relationship with innovation. The solutions are two-step difference generalized method of moments estimator (GMM) with lags of the endogenous variables in levels used as instruments for the endogenous variables in first-differences.

3.1 Measures for innovation

In this paper, *Financial R&D Intensity* is the proxy for financial innovations as suggested by Beck *et al.* (2016). The choice is explained since this measure is concerned mainly with the process of financial innovation instead of with its outputs and highlights the link between competition and innovation and incorporates the concept of financial innovation proposed by Tufano (2003).

Financial R&D Intensity equals either to the ratio between R&D expenditures for financial intermediation sector and value added in financial intermediation area (*Financial R&D Intensity (Value Added)*) or to the rate of R&D expenses financial system to total operating expenses of banks (*Financial R&D Intensity (Cost)*). In both cases, the final result is multiplied by 100 to scale the estimated coefficients in the empirical results. Both indicators use banking industry's business enterprise R&D expenditure as input. For most of the countries and years, OECD/Eurostat International Survey of Resources Devoted to R&D makes available the values in local currency. In case of missing data, OECD Science, Technology and R&D Statistics help in determining the R&D costs for financial intermediation area. R&D and related key concepts are in accordance with the agreed standards issued by the Organization for Economic Cooperation and Development (OECD) and listed in the Frascati Manual 2002. Value added in financial sector equals to the difference between the amount of output generated and intermediate consumption. This measure shows in absolute terms the contribution of banking activities to GDP on an annual basis. The figures on the twenty countries under analysis for the timeframe 1999-2013 are part of STAN, the OECD Structural Analysis Statistics. Total operating costs represents the sum of non-interest expenses, i.e. staff and property costs and other operating expenses. OECD Banking Statistics and BankScope are the sources for the data. Although, financial intensity (cost) overestimates the financial innovation since the total operating costs are incurred at the bank level, not for the entire banking system, it is better than patents, existence of credit scoring agencies, ATM adoption since it reflects the overall innovation of the financial intermediation sector. The main concern of using financial intensity as proxy relates to the financial innovation indicator because a measurement bias may occur due to no clear definition of innovative activities in financial sector. But, a couple of steps are taken to eliminate potential flaws. Firstly, data on R&D expenditure in financial intermediation sector is a part of Analytical Business Enterprise Research and Development (ANBERD) database, which offers reliable and internationally comparable information on enterprise R&D expenditures in different industries and moments in time. The input is based on surveys conducted by OECD or Eurostat on companies and banks being involved or implementing R&D projects and sums up intramural and extramural R&D expenditures as Frascati Manual recommends.

According to the descriptive statistics from Table 1 the mean of *Financial Intensity (Value Added)* is around 0.267 %. The low standard deviation of 0.203 % suggests that the results remain very close to the expected value. Within-country variation explains most of the standard deviation (0.308 %) whereas cross country variation accounts only for 2.990 %. Moreover, the variable under scrutiny takes values between 0.000 % in Slovak Republic in 2011 and 2013 to 1.250 % in Sweden in 2003. All these outcomes are slightly lower than the ones present in Beck *et. al* (2016). In that research a mean of 0.329 %, standard deviation of 0.392 % and a maximum equal to 1.813 % characterize a larger sample of 31 countries during 1996-2006.

Table 1. Measures of overall financial innovation (1999-2013)

Variable	Mean	Std. Dev.	Min	Max	Countries	Obs.
Fin. R&D Intens. (Value Added)	0.267%	0.203 %	0.000%	1.250%	20	300
Fin. R&D Intens. (Cost)	3.246%	2.912%	0.009%	13.046%	20	300

Even though the values from the current research and Beck *et al.* (2016) seem low, they are not far from the mean (0.409 %) and standard deviation (0.327 %) of the Financial R&D Intensity in the service area, excluding financial intermediation. At the same time, *Financial R&D Intensity (Value Added)* for innovation is alike to the values for manufacturing area for the same countries and years. Table 2 shows a mean of 4.193 % and 3.001 % standard deviation for Financial R&D Intensity in manufacturing.

Table 2. Measures of innovation in services and manufacturing (1999-2013)

Variable	Mean	Std.Dev.	Min	Max	Countries	Obs.
R&D Intensity Serv.(Value Added)	0.409%	0.327 %	-1.327%	1.720%	20	300
R&D Intensity Manuf. (Value Added)	4.193%	3.001%	0.322%	12.804%	20	300

The level of financial novelties is higher for the non-Euro group (mean of 0.317 % versus 0.235%) since states like Denmark, Norway and Sweden are innovation leaders worldwide with well-developed and sound banking sectors (Table 3). The three states validate the hypothesis of Carbo, López del Paso and Rodríguez-Fernández (2007) that being located in a region with higher financial

novelty level, stimulates a country to be more innovative. Further, the maximum of 1.250 % belongs Sweden and there is a small variation in the outcomes as the standard deviation is around 0.375%. Among the states with Euro as national currency, Finland, the Netherlands, Belgium and Slovenia generate the most innovations in financial area. Hence, on average there exist no substantial discrepancies between the most innovative states and the other Eurozone members according to the standard deviation of 0.241 %.

Table 3. Financial R&D Intensity (Value Added) in Eurozone and non-Euro states (1999-2013)

Variable	Mean	Std. Dev.	Min	Max	Countries	Obs.
Financial R&D Intensity (Value Added) Eurozone	0.235%	0.241 %	0.000%	0.929%	12	120
Financial R&D Intensity (Value Added) non-Euro countries	0.317%	0.375%	0.000%	1.250%	8	180

R&D plays a role not only in manufacturing sector, but also in services respectively for financial institutions. Higher average amount (3.246 %) and standard deviation (2.912 %) characterize the *Financial R&D Intensity (Cost)*. One of the reason is smaller denominator, the total operating costs of the banks that is below the value added in local currency, used in computation of *Financial R&D Intensity (Value Added)*. For the alternative measure for financial innovation, states with Euro as main currency dominate with a higher average of 3.438 % (Table 4). The major contribution to this result belongs to Belgium (with maximum value of 13.046 %), Portugal and Finland. High expenditures for R&D initiatives in financial sector and cost efficiency are the explanation for these outcomes. The non-Euro countries record a lower mean with Sweden, Norway and Czech Republic distinguishing as most innovative. Nonetheless, the values vary a lot given different costs levels depend on the laws, regulations and economic conditions from each country. For instance, starting with 2007, the compensation costs decline in Switzerland due to a drop in bonus payments.

From 1999 to 2013, financial innovation expressed as *Financial R&D Intensity (Value Added)* fluctuates from time to time. Though, the efforts in this area double and validate the supposition that more innovative activities take place. Similar outcomes are part of the study of Beck *et al.* (2016). As for the country level, innovation varies depending on the state. For example, Italy, United Kingdom, Spain and Sweden register decreasing financial innovation intensity for 1999-2013. Rossignoli and Arnaboldi (2009) obtain the same results for Italy and UK. Moreover, the two authors consider financial crisis and "once for all"

innovations as the main causes for the drop. In contrast, in Slovenia, Slovak Republic and Portugal, more resources are allocated for R&D actions in banking.

Table 4. Financial R&D Intensity (Cost) in Eurozone and non-Euro states (1999-2013)

Variable	Mean	Std. Dev.	Min	Max	Countries	Obs.
Financial R&D Intensity (Cost) Eurozone	3.438%	3.055%	0.067%	13.046%	12	120
Financial R&D Intensity (Cost) non-Euro countries	2.958%	2.670%	0.009%	11.545%	8	180

For the same timeframe, financial innovation slightly decreases in non-Euro states (from 0.338 % to 0.306%) whereas it flourishes in Euro countries (it starts at 0.161 % and reaches 0.288 %). Consequently, two opposite trends characterize the countries selected. In Euro area, there are sustained efforts to encourage countries embracing a more innovative culture. As a matter of fact, European experts see innovation as a major vector of economic growth and stability and policies in this direction appear and evolve continuously. On the contrary, the non-Euro states do not consider financial novelties a priority anymore, since much of the work in this direction has been done in the past. Consequently, the innovation level remains above the one for Eurozone. The most dramatic decrease in innovation characterize the years 2002-2005 when in Denmark the R&D expenditures drop significantly.

The majority of the countries included in this study have well developed financial systems. The existence of private credit institution is an indicator of the economic development of a country. In this paper, Private Credit is the log of private credit divided by GDP. The input on private credit by GDP comes from Beck *et. al* (2016).

To ensure the validity of the proxy, patent data on manufacturing available via World Intellectual Property Organization (WIPO) are taken into account. The reason behind is that patents diminish the concerns related to survey data being influenced by country specific characteristics. Between the manufacturing Financial R&D Intensity and log of number of patents fillings per $billion GDP there is a positive and statistically significant correlation of 0.739 (p-value of 0.000). Consequently, there is no reason to consider that survey data are influenced by country-specific characteristics for innovative activities. Thus, the indicator is a good proxy for innovation in banking system. To the same conclusion comes Beck *et al.* (2016) as well. Furthermore, the correlation of financial innovation with the ratio of off-balance-sheet items and total assets of banks plays a role in checking the validity of financial intensity as financial

innovation proxy. Data are available via OECD Banking Statistics and BankScope. Calomiris (2009) asserts that certain financial innovations like credit card receivables and subprime residential mortgages are tools for arbitraging regulatory capital requirements as assets are booked off the balance sheets of regulated banks. Thus, the correlation of financial innovation with the ratio of off-balance-sheet items and total assets of banks should be positive and significant. Indeed, there exist a positive correlation between *Off-Balance-Sheet Items/ Assets* and *Financial R&D Intensity (Value Added)*, even if the significance is lower do to different regulations on reporting the off-balance sheet items and only some part of financial innovation is reflected. Beck *et al.* (2016) obtain a similar outcome in their paper. Before financial crisis, *Financial R&D Intensity (Value Added)* and *Financial R&D Intensity (Cost)* are on average 0.244 % and 3.510 %, respectively. After 2007, the innovation decreases more in terms of cost than in value, proving that banks are focus on cutting their expenditures and reorganizing their activities. The change is significant at 10 % level only in the case of the first indicator (Table 5).

Table 5. The impact of financial crisis on innovation

Variable	Mean prior crisis	Mean after crisis	Difference	t-statistics
Financial R&D Intensity (Value Added)	0.244	0.305	-0.062 %*	-1.730
Financial R&D Intensity (Cost)	3.051	3.539	-0.480 %	-1.400
Number of Observations	180	120		

Furthermore, researchers and practitioners blame financial novelties for causing the turmoil of 2007-2008. Consequently, financial institutions do not allocate resources to innovations. Moreover, Rossignoli and Arnaboldi (2009) claim that after the events of 2007-2008, banks are more conservative when they design their strategies and consider financial innovation a risky path to follow. At the same time, authorities start regulating innovative financial products and services, making them more expensive to be implemented.

3.2 Measures for competition

As for competition, several indicators like Lerner index, adjusted Lerner index and Boone indicator attempt to proof the validity of the results and offer different perspectives. All of them are part of the study of Clerides, Delis and Kokas (2015). The Lerner index is still currently the most widely and frequently used and it is known as a measure of market power and the intensity of competition. As a matter of fact, Lerner (1934) describes his indicator as "index of the degree of monopoly power" and defines it mathematically as:

$$\text{Lerner}_i = \frac{P_i - mc_i}{P_i} \quad (3)$$

where P_i represents firm i's price whereas mc_i refers to marginal cost.

The values of the index range between zero and one, with zero reflecting perfect competition and increasing values showing a higher market power. The spread usage of Lerner index stems from fewer data constraints, easy interpretation and simplicity. Basically, Lerner indicator shows the extent to which a bank can charge prices higher than the marginal cost. Consequently, there are only two data requirements. Hence, marginal cost should be estimated either by using a cost function or by defining certain equilibrium conditions resulted from theoretical models in order to have marginal cost estimates. Banking literature uses the former method most of the time, whereas the latter is applied by industrial organization economists. For the current research, data on Lerner index is provided by Clerides, Delis and Kokas (2015) and it is preferred to World Bank indicator since it is based on a semiparametric method for the computation of marginal costs. When the values of the Lerner index are high, the degree of competition is low. The average value of Lerner index in the current sample equals 0.172 with a standard deviation of 0.098 (Table 6). Overall, the twenty countries under scrutiny do possess very competitive financial systems and they are similar in terms of competition. The smallest value of Lerner index equals -0.020 and is registered in Estonia. The lowest level of competition occurs in Czech Republic in 2012 and reaches 0.550. The results are closed to the findings of Clerides, Delis and Kokas (2015).

Table 6. Measures of competition (1999-2013)

Variable	Mean	Std. Dev.	Min	Max	Countries	Obs.
Lerner index	0.172	0.098	-0.020	0.550	20	298
Adjusted Lerner index	0.157	0.094	-0.070	0.460	20	298
Boone indicator	-0.045	0.156	-2.080	0.050	20	298

The market power increases on average between 1999 and 2005. Starting with 2006 begins a decline that takes for three years. After 2008, Lerner index gets higher until 2011. During years 2012 and 2013, the market power drops. The movements coincide with the conclusions of Beck *et al.* (2016) and Clerides, Delis and Kokas (2015) and follow the global business cycle. Bank efficiency is higher during the upward phase of the business cycles due to better information availability and decreasing adjustment expenses. Since the resulting cost savings are not fully transferred to the prices charged for banking products, the market power gets up.

The variations in competitiveness level is present no matter of national currency. Yet, Euro countries prove to be more competitive as their counterparties. The result comes naturally since in Eurozone area there are always challenges that make banks act more willing to have attract new customers. Koetter, Kolari and Spierdijk (2012) propose a new measure for market power, based on the fact that Lerner index makes two major assumptions. The former is the companies choose the prices that maximize the profits (profit efficiency). The latter refers to obtaining the inputs at the most appropriate cost (cost efficiency). Thus, the estimated price-cost margins do not accurately reflect the real market power of the business entities. As a matter of fact, Lerner (1934) focuses on actual or exercised market power, whereas Koetter, Kolari and Spierdijk (2012) are concerned only with potential market power. Therefore, Lerner index is altered for efficiency and becomes adjusted Lerner index. The mathematical equation is:

$$\text{adjusted Lerner}_i = \frac{\pi_i + tc_i - mc_i \cdot q_i}{\pi_i + tc_i} \quad (4)$$

with the bank profit being π_i, total cost tc_i, marginal cost mc_i and total output q_i. The adjusted Lerner index can take values between 0 and 1, higher results reflecting stronger market power.

For the used sample, adjusted Lerner index is close to 0 and presents the states under analysis as having less rivalry in banking sectors (Table 6). Over the timeframe 1999-2013 there exist a decrease in competition across all the countries of interest. Though, the drop is lower in this case in comparison to the standard Lerner index. Increases in market power occur, as in the case of Lerner index, until 2005 and between 2008-2011. The variations confirm the findings of Clerides, Delis and Kokas (2015) and are primarily due to the expansion of financial globalization before 2007. The acquisition of local banks facilitates the expansion on new markets and implicitly, higher market power.

Decreasing competition is present in both subsamples. Nonetheless, Euro-states remain more competitive and exhibit smaller variations. More market power exists before 2005 and from 2008 to 2011. In all the other years, competition levels drop. These changes are alike to the ones exhibited by Lerner index. The only difference consists in lower values for Eurozone countries for 1999-2002, primary due to drop in the competitiveness of banking sectors of Germany, Slovak Republic and Slovenia. Boone indicator is a new approach to measure competition used by van Leuvensteijn *et al.* (2011) for the first time in an empirical study. The index replaces *relative profit differences* that is a theoretical construct difficult to be implemented in practice and proposed by Boone (2008). Boone indicator expresses the elasticity of profits to marginal costs:

$$\text{profit elasticity}_i = \frac{\partial \ln \pi_i}{\partial \ln mc_i} \quad (5)$$

where π_i shows the firm i's total profits and mc_i equals the marginal costs.

Profit elasticity is expected to take negative values due to the inverse relationship between profits and marginal costs.

More efficient banks should have a lower Boone indicator, in absolute terms, since their returns should be not seriously impacted by incremental expenditures. A large absolute value of Boone indicator shows that the financial institution is less capable to manages its losses as a direct result of increasing competition. Therefore, profit elasticity is the connection between the overall performance of a bank and different levels of efficiency. It can have any value and represents consequently a continuous measure of market power. There are two major advantages of the profit elasticity index. The indicator does not differentiate between small and large countries and does not analyze the competitive nature of the total of all banking activities. Additionally, it is computed by World Bank and available for the years and the states under scrutiny. As Table 6 suggests the mean value for Boone indicator is -0.045 with 0.156 standard deviation. Therefore, the banking sectors of all 20 countries are competitive on average and substantial differences exist among the selected states. The Boone indicator ranges from -2.080 to 0.050. Both values belong to Finland in 2004 and 2003, respectively. Belgium, Poland and Portugal have the highest degree of competition in banking area. From 1999 to 2013, the level of competition decreases across the states in the sample. This trend is also suggested by both Lerner and adjusted Lerner index. The increases in competitiveness take place only for 2002-2005 and 2011-2013. For year 2005, Boone indicator decreases to an average of -0.056 primary due to a value of -2.080 for Finland. The other states, do not exhibit great variations in competition.

Table 7. The impact of financial crisis on competition

Variable	Mean prior crisis	Mean after crisis	Difference	t-statistics
Lerner index	0.173	0.171	0.002	0.190
Adjusted Lerner index	0.173	0.132	0.041***	3.460
Boone indicator	-0.053	-0.033	-0.021	-1.170
Observations	180	120		

*, **, *** show statistical significance at the 10%, 5% and 1% level.

Financial crisis changes the competitive behavior of the banks. After 2007, banks become more competitive as all the three measures show in Table 7. Though, only in the case of adjusted Lerner index, the increase in competition is significant with a 1% p-value. The overall situation in the sample is opposed to

the one from United States, for example, where the large credit and housing bubbles deteriorate the competition among the financial intermediaries.

3.3 Control variables

Banking system and country specific features impact the competition and innovation. Therefore, following the Arnaboldi and Rossignoli (2015) recommendation several control variables are present in this research.

Banking system

The size of the banking system indicates potential development opportunities and accounts for the possibility of financial innovations at the country level as Dermine (2006) claims. Also, the relationship between banking sector size and innovation is suggested by Schumpeter (1950). Kamien and Schwartz (1982) confirm the Schumpeterian hypothesis and claim that a potential positive relationship between the size of the banking system and innovation is due to economies of scale in R&D and diversification advantages that diminish the risks. The ratio of total assets of all banks to GDP and the number of bank employees to the number of banks rate express how big and developed the banking sector is. The last measure is a proxy of labour productivity and should be positively linked to innovation. On average, total assets to GDP are equal to 0.251 with a small standard deviation of 0.204 (Table 8). This measure ranges between 0.050 in Poland (1999) to 1.37 in United Kingdom (2008). The mean for productivity is 642.211 and it is negatively and significantly correlated with *Financial R&D Intensity (Value Added)*. A positive, yet not significant correlation exists between the ratio of the number of bank employees to the number of banks and *Financial R&D Intensity (Cost)*. OECD Banking Statistics, BankScope and the official web pages of national banks provide the necessary data. The expectation would be that innovative banks activate in small and crowded banking systems.

Table 8. Summary statistics for control variables (1999-2013)

Variable	Mean	Std.Dev.	Min	Max	Countries	Obs.
Total assets/GDP	0.251	0.204	0.050	1.370	20	300
Labour productivity	642.211	406.858	70.987	1,779.070	20	300
Entry into banking	7.533	1.003	2.000	8.000	20	300
Capital index	5.543	1.967	2.000	10.000	20	300
Transparency	7.973	1.763	3.000	11.000	20	300
GDP growth	1.958	2.967	-14.720	10.830	20	300

Country-level data

The GDP growth and long-term yield indicate the probable development of the financial sector in the countries under scrutiny. The data source is World Development Indicators, 2010. Broadly, the GDP increases annually by 1.958 % and varies significantly i.e standard deviation of 2.997 (Table 8). The highest growth occurs in Slovak Republic while Estonia registers a negative GDP variation in 2009. Barth, Caprio and Levine (2013) propose other three indexes that are relevant for the macro-economic environment for a state. The Entry into Banking Requirements index focuses on the answer to eight questions related to information or documents requested to receive the banking license. The countries in the sample have a high score of 7.533 which translates into banking systems that do not encourage new entrants (Table 8). Capital Regulatory Index shows, based on ten variables, whether the capital requirement accurately reflects risks and considers the losses due to capital adequacy rules and whether funds can be used to initially capitalize a bank and whether there are official verifications of the amounts. Larger values of this measure are a sign of difficulty in conducting business. For the current sample the requirements on capital are not so stringent as a mean of 5.543 suggests. Though, the standard deviation of 1.967 shows that the conditions to be fulfilled differ from state to state. Estonia and Sweden have banking sectors with less demands regarding bank capitalization whereas in Belgium and Denmark they are the tightest. Financial Statement Transparency indicator assigns the degree of accuracy to bank financial statements practices. The higher are the values of this measure, the more transparent is the banking system. In general, banking sectors of the 20 states are very transparent but there are variations from one country to another. Banks in Hungary promote less accuracy while Italy and United Kingdom have the most transparent financial institutions. Furthermore, a dummy for financial crisis effect is an element of this study as financial crisis should lower the degree of innovation. The banking crises database of Laeven and Valencia (2012) provides the years when the financial crisis has started in analyzed countries.

4. RESULTS

This paper provides several empirical results. The major objective of the research refers to the link between competition and innovation in banking sector. For this purpose, several models are proposed (Table 9) . As for methodology, two-step difference GMM estimator is used. In model specification 1, the dependent variable is first-difference in *Financial R&D Intensity (Value)* and the independent variables are first-difference in Lerner index and its squared form.

Table 9. Competition and innovation: difference GMM estimator

Specification estimation	(1)	(2)	(3)
ΔLerner index$_{it}$	0.439**		
	(0.212)		
ΔLerner index$^2_{it}$	-0.737**		
	(0.377)		
ΔAdjusted-Lerner index$_{it}$		0.434**	
		(0.192)	
ΔAdjusted-Lerner index$^2_{it}$		-1.206**	
		(0.449)	
ΔBoone indicator$_{it}$			-0.002
			(0.005)
ΔBoone indicator$^2_{it}$			0.064
			(0.049)
Wald-chi square	50.740***	23.020***	23.560***

*, **, *** show statistical significance at the 10%, 5% and 1% level. The standard deviations are available in parentheses.

The Arellano- Bond test for serial correlation shows, based on the outcomes of tests for second-order serial correlation in first differences, there no first-order autocorrelation in levels exist. Therefore, the second lags in competition term and its squared function are used as instruments. The same outcomes characterize the following models in which adjusted Lerner index and Boone indicator replace standard Lerner index.

In the first two cases, there is a significant U-inverted relationship between competition and innovation at 5 % level. Boone indicator validates the inverse link as well, but in the absence of any significance degree. The standard errors listed in parantheses are robust against heterokedasticity and serial correlation. The results confirm the first hypothesis of the current research and are in line with the findings of Bos, Kolari and van Lamoen (2013). Additionally,the model expands by including difference in labour productivity, GDP growth and total assets to GDP, Entry into Banking Requirements index, Capital Regulatory index and Financial Transparency as control variables. In all three situations, the presumed U-shaped relationship between innovation and competition exist. Though, only adjusted Lerner index stays significant at 1 % level (Table 10).

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Table 10. Competition and innovation: difference GMM and control variables

Specification estimation	(4)	(5)	(6)
ΔLerner index$_{it}$	0.296		
	(0.195)		
ΔLerner index$^2_{it}$	-0.514		
	(0.438)		
ΔAdjusted-Lerner index$_{it}$		0.376***	
		(0.119)	
ΔAdjusted-Lerner index$^2_{it}$		-0.974***	
		(0.349)	
ΔBoone indicator$_{it}$			-0.002
			(0.004)
ΔBoone indicator$^2_{it}$			0.021
			(0.064)
ΔEntry into Banking Requirements$_{it}$	-0.004	-0.004	-0.004
	(0.006)	(0.007)	(0.013)
ΔCapital Regulatory Index$_{it}$	0.004	0.005	0.005
	(0.007)	(0.007)	(0.010)
ΔFinancial Transparency$_{it}$	-0.001	-0.001***	-0.001
	(0.000)	(0.000)	(0.001)
ΔLabour productivity$_{it}$	0.000	0.000	0.000
	(0.000)	(0.000)	(0.000)
ΔGDP growth$_{it}$	-0.002	-0.002	-0.002
	(0.002)	(0.001)	(0.002)
Δ Total assets to GDP$_{it}$	0.150	0.074	0.117
	(0.970)	(0.049)	(0.939)
Wald-chi square	47.42***	73.210***	12.960

The p-values are reported using asterisks. *, **, *** show statistical significance at the 10%, 5% and 1% level. The standard deviations are available in parentheses.

At the same time, the means and standard deviations of competition measures slightly decrease. The average values of entry, capital and transparency requirements are low and stable across countries. When the first difference in financial transparency appears adjusted Lerner index and its squared form, it is significant at 1%. The first difference in entry requirements, financial statement transparency and GDP growth have a negative yet not significant impact on innovation. The remaining control variables impact positively the value of financial novelties.

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5. CONCLUSIONS

The current research attempts to identify an inverse -U link between competition and innovation for the banks located in Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Italy, Netherlands, Norway, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, Switzerland and United Kingdom during 1999-2013.

Financial R&D Intensity (Value Added) and *Financial R&D Intensity (Cost)* are the measures that show the overall innovation banks generate during their current activities. OECD database and BankScope provide the required data for the analysis. From 1999 to 2013, there is an increase in financial novelties especially in Eurozone countries. Belgium, Sweden, Norway remain constantly the most innovative states in banking sector. These results are aligned with the available researches on the topic. Lerner index, adjusted Lerner index and Boone indicator provide different perspectives on the market power that characterizes banking systems. Clerides, Delis and Kokas (2015) and World Bank make the necessary input available. Overall, there is a decrease in competition across the entire sample. Increases in market power occur mostly until 2005 and from 2008 to 2011 due to financial globalization and the acquisition of local banks in new markets. This outcome is similar to the findings in previous literature. Euro area states are more competitive that the other European countries.

Two-step difference GMM provides better estimates in case of endogeneity among dependent and independent variables, in comparison to traditional techniques like OLS. Additionally, the optimal weighting matrix causes a lower asymptotic variance of the predictor. Another advantage of the methodology used in this study is the improved efficiency whenever heteroscedasticity is present. Moreover, financial crisis impacts negatively, still not significantly the financial novelties and competition. After 2007, banks reconsider their strategies and take a more conservative position. The conclusions of this paper are based on two step difference GMM methods for *Financial R&D Intensity (Value Added)* and *Financial R&D Intensity (Cost)* as innovation indicators and Lerner index, adjusted Lerner index and profit elasticity as measures of competition. Control variables on both country and banking system level are part of the analysis. Further studies should be done in this area maybe using different datasets that refer to either other country or groups of states. The existing methodologies and estimates can be improved and developed.

References

1) Aghion, P. and Griffith, R. (2005). *Competition and Growth: Reconciling Theory and Evidence.* Cambridge: MIT Press.
2) Arnaboldi, F. and Rossignoli, B. (2015). Financial innovation in banking. In: E. Beccalli and F. Poli, eds., *Palgrave Macmillan Studies in Banking and Financial Institutions*. London: Palgrave Macmillan, pp. 127-162.

3) Barth, J., Caprio G. and Levine, R. (2013). Bank Regulation and Supervision in 180 Countries from 1999 to 2011. *Journal of Financial Economic Policy,* 5(2), pp. 111-129.
4) Beck, T., Chen, T., Lin, C. and Song, F. (2016). Financial innovation: the bright and the dark sides. *Journal of Banking & Finance,* 72(4), pp. 28-51.
5) Berger, A., Hanweck, G. and Humphrey, D. (1987). Competitive viability in banking. Scale, scope and product mix economies. *Journal of Monetary Economics*, 20(3), pp. 501–520.
6) Bhattacharyya, S. and Nanda, V. (2000). Client discretion, switching costs, and financial innovation. *Review of Financial Studies,* 13(4), pp. 1101–1127.
7) Bikker, J.A., Shaffer, S. and Spierdijk, L. (2012). Assessing competition with the Panzar-Rosse model: the role of scale, costs, and equilibrium. *The Review of Economics and Statistics,* 94(4), pp. 1025-1044.
8) Boone, J. (2008). A new way to measure competition. *The Economic Journal,* 118(531), pp. 1245–1261.
9) Boot, A. and Thakor, A. (1997). Banking scope and financial innovation. *Review of Financial Studies*, 10(4), pp. 1099-1131.
10) Bos, J., Kolari, J. and van Lamoen, C. (2013). Competition and innovation: evidence from financial services. *Journal of Banking & Finance,* 37(5), pp. 1590–1601.
11) Calomiris, C. (2009). Financial innovation, regulation, and reform. *Cato Journal,* 29(1), pp. 65-91.
12) Carbo, S., Humphrey, D., Maudos, J. and Molyneux, P. (2009). Cross-country comparisons of competition and pricing power in European banking. *Journal of International Money and Finance,* 28(1), pp. 115-134.
13) Carbo, S., López del Paso, R. and Rodríguez-Fernández, F. (2007). Financial innovations in banking: impact on regional growth. *Regional Studies,* 41(3), pp. 311-326.
14) Clerides, S., Delis, M. and Kokas, S. (2015). A New Data Set On Competition. In National Banking Markets. *Financial Markets, Institutions & Instruments,* 24(2-3), pp. 267–311.
15) Dermine, J. (2006). European banking integration: don't put the cart before the horse. *Financial Markets, Institutions and Instruments,* 15(2), pp. 57-106.
16) Hauswald, R. and Marquez, R. (2006). Competition and strategic information acquisition in credit markets. *The Review of Financial Studies*, 19(3), pp. 967–1000.
17) Kamien, M. and Schwartz, N. (1982). *Market Structure and Innovation.* Cambridge: Cambridge University Press.
18) Koetter, M., Kolari, W.J. and Spierdijk, L. (2012). Enjoying the quiet life under deregulation? Evidence from adjusted Lerner indices for U.S. banks. *The Review of Economics and Statistics*, 94(2), pp. 462-480.
19) Laeven, L. and Valencia, F. (2012). Systemic banking crises database: an update. *Unpublished working paper.* IMF. Available at: https://www.imf.org /en/Publications/WP/Issues/2016/12/31/Systemic-Banking-Crises-Database-An-Update-26015 [Accessed 01.03.2018].
20) Laeven, L., Levine, R. and Michalopoulos, S. (2015). Financial innovation and endogenous growth. *Journal of Financial Intermediation*, 24(1), pp. 1-24.

21) Lerner, A. (1934). The concept of monopoly and the measurement of monopoly power. *Review of Economic Studies,* 1(3), pp. 157-175.
22) Mariotto, C. and Verdier, M. (2015). Innovation and competition in Internet and mobile banking: an industrial organization perspective. *Bank of Finland research discussion papers*. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2763701 [Accessed 01.04.2018].
23) Panzar, J. and Rosse, J. (1987). Testing for ''monopoly'' equilibrium. *Journal of Industrial Economic,* 35(4), pp. 443-456.
24) Rossignoli, B. and Arnaboldi, F. (2009). Financial innovation: theoretical issues and empirical evidence in Italy and in the UK. *International Review of Economics,* 56(2), pp. 275-301.
25) Schumpeter, J. (1950). *Capitalism, socialism and democracy*, 3rd edition. London: Allen and Unwin.
26) Tufano, P. (2003). Financial innovation. In: G. Constantines, M. Harris and R. Stulz, eds., *Handbook of the Economics of Finance.* Amsterdam: North Holland.
27) Van Leuvensteijn, M., Bikker, J., van Rixtel, A. and Sørensen, C. (2011). A new approach to measuring competition in the loan markets of the euro area. *Applied Economics,* 43(23), pp. 3155-3167.
28) Wheelock, D., and Wilson, P. (1999). Technical progress, inefficiency, and productivity change in US banking, 1984–1993. *Journal of Money, Credit and Banking,* 31(2), pp. 212–234.

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CONSIDERATIONS ON THE INFLUENCE OF THE FUTURE EUROPEAN MONETARY FUND ON THE ROMANIAN FISCAL POLICY

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Abstract
Over the last years, the European financial crisis generated different proposals including the one referring to establish a European Monetary Fund which was considered in 2010 to be a solution to manage the public debt of the EU member states. The proposal took into consideration the fact that the Member States should coordinate their economic policies and challenges.
Based on the plans made in the last speech "State of the Union Address" of the Jean-Claude Juncker, the European Commission President, on 13 September 2017 the European Commission presented on 6 December 2017 a set of communications regarding the next steps for further deepening Europe's Economic and Monetary Union (EMU). One of the proposal included in COM (2017) 827 final referred to a Council Regulation for the establishment of the European Monetary Fund.
The paper is a continuation of an analysis published by the authors at the beginning of this year on the proposal of the European Commission to create a post of an Economy and Finance Minister. As already stated, the EU member states have the obligation to cooperate, to coordinate and to ensure sound public finance in order to prevent excessive macroeconomic imbalances. The aim of this paper is to present the role of the new to be created European Monetary Fund in the EU overall structure, its responsibilities but also its influence on the future Romanian fiscal policy that should apply the rules of the Fiscal Compact and reduce debt-to-GDP ratio.
Keywords: *European Monetary Fund; fiscal policy; Fiscal Compact; public debt; fiscal and financial rules.*
JEL Classification: K34, K33, H26

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1. PRELIMINARY REMARKS

In the last speech "State of the Union Address" of Jean-Claude Juncker (Juncker, 2017), the European Commission President mentioned three elements that are important for the Economic and Monetary Union (EMU), i.e. unity, efficiency and democratic accountability and also that in December 2017 the European Commission will publish a set of documents required to strengthen EMU. Out of the these documents, relevant for this analysis are the Communication from the Commission to the European Parliament, the European Council, the Council and the European Central Bank COM (2017) 821 final, Further steps towards completing Europe's Economic and Monetary Union: a roadmap (*Communication COM (2017) 821*) and the proposal for a Council Regulation on the establishment of the European Monetary Fund, COM (2017) 827 final (*Communication COM (2017) 827*).

The article includes an overview of the proposal included in the Communication COM (2017) 827 regarding the establishment of a European Monetary Fund in order to identify the possible effects on the Romanian future fiscal policy.

2. SHORT HYSTORY OF THE FINANCIAL MECHANIMS BEFORE THE EUROPEAN MONETARY FUND

In 2010 further to the European financial crisis of 2008, the European Union had to provide financial assistance to Ireland, Portugal and Greece. The instrument used at that time was called European Financial Stability Facility (EFSF) and consisted of issuance of EFSF bonds and other debt instruments on capital markets. EFSF was not based on any provision of the Treaty of the Functioning of the European Union (TFEU) and currently exists and is issuing only bonds and it forms part of the European Stability Mechanism (Gros and Mayer, 2017, p. 2).

In order to integrate EFSF into the EU legislation it was adopted the Council Regulation (EU) no 407/2010 establishing a European financial stabilisation mechanism (EFSM). This regulation was adopted by the Council based on the article 122 (2) TFEU stipulating:

"Where a Member State is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control, the Council, on a proposal from the Commission, may grant, under certain conditions, Union financial assistance to the Member State concerned. The President of the Council shall inform the European Parliament of the decision taken."

It was argued that a global financial crisis and economic downturn represent "exceptional occurrences" beyond the control of a Member State as it can affect economic growth and financial stability of a Member States and can cause a strong deterioration in the deficit and debt positions of a Member State. As

mentioned in Article 1 of the Council Regulation (EU) no 407/2010, a Member State may request Union financial assistance in case "is experiencing, or is seriously threatened with, a severe economic or financial disturbance caused by exceptional occurrences beyond its control, taking into account the possible application of the existing facility providing medium-term financial assistance for non-euro-area Member States' balances of payments, as established by Regulation (EC) No 332/2002". The Council Regulation (EU) no 407/2010 applies to all Member States.

In addition, on 17 December 2010 the European Council decided that the euro area Member States needs a permanent stability mechanism, which was called European Stability Mechanism ("ESM"). In order to implement it the European Council adopted Decision 2011/199/EU amending Article 136 TFEU by adding the following paragraph:

"The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality".

The euro Member States signed on 2 February 2012 the Treaty establishing the European Stability Mechanism created ESM as an international financial institution that is working similar to International Monetary Fund (IMF). The contracting parties of this Treaty agreed that ESM loans will enjoy preferred creditor status similar to those of the IMF, but the IMF will have preferred creditor status over the ESM.

The creation of ESM and was contested in front of the European Union Court of Justice (EUCJ) in the case Pringle. The case was brought in front of the EUCJ by Mr Thomas Pringle claiming "that Decision 2011/199 was not lawfully adopted pursuant to the simplified revision procedure provided by Article 48(6) TEU because it entails an alteration of the competences of the European Union contrary to the third paragraph of Article 48(6) TEU and that Decision 2011/199 is inconsistent with provisions of the EU and FEU Treaties concerning economic and monetary union and with general principles of European Union law" (Case C-370/12, paragraph 24). The Court decided, after a detailed analysis that the Decision 2011/199 is valid and no provision in the TFUE or general principle of effective judicial protection preclude the Member States to conclude such treaties.

At this moment, in the European Union there are two financial assistance mechanisms, EFSM working for non-euro Member States and ESM providing assistance to euro area Member States. The existence of several mechanisms is considered to be not that efficient from the use of resources point of view. The creation of EMF is presented as one of the measures needed in order to have a more efficient Union, which means "a more efficient use of the available resources" (Communication COM (2017) 821, p. 4).

The necessity to transform the ESM into EMF was underlined in the European Parliament resolution of 16 February 2017 on budgetary capacity for the euro area (2015/2344(INI)):

"The ESM, while fulfilling its ongoing tasks, should be further developed and turned into a European Monetary Fund (EMF) with adequate lending and borrowing capacities and a clearly defined mandate, to absorb asymmetric and symmetric shocks."

3. THE ROLE OF THE EUROPEAN MONETARY FUND

The current EMS established in 2012 as an international financial institution is not part of the EU institutions and as consequence is not accountable to the EU Parliament and it is not audited by the EU Court of Auditors (Wyplosz, 2017, p. 12). Even if the Commission documents are not very clear on this subject, the mere fact that ESM is not part of the EU institutions is considered to be outside the control of the EU Parliament.

The creation of the EMF is based on the above quoted Article 136 paragraph (3) and Article 352 TFEU. In the Pringle Case (C-370/12, paragraph 67) the Court already stated that the Union could establish a stability mechanism comparable to ESM on the basis of Article 352 TFEU. It is important to underline that EMS and its continuation EMF are both formed by Member States whose currency is the euro.

The proposal made by the European Commission is interesting as transforms the current EMS into an institution governed by the Union law and the financial and institutional structures of EMS are transferred into the EMF. The scope of this transformation is to get a stronger legal entity within the Union that will improve its cooperation with the Commission and will make it accountable to the European Parliament and Council. This transformation is considered to be "part of a wider institutional reform of the fiscal dimension of the euro area" (Sapir and Shoenmaker, 2017, p.1).

One of the challenges that EMS faced in practice resulted from the fact that because was not part of the Union, the European Parliament or the national parliaments had no possibility to ask questions to EMS.

Further to the analysis of the proposed Regulation, it results the EMF will have the obligation to deliver to the European Parliament an annual report on the execution of its tasks. In addition, the Parliament has the possibility to ask oral and written questions and to organise hearings or to organise confidential oral discussions with the EMF's Managing Director. Also, the national Parliaments have the possibility to obtain information about the activities of EMF, to ask questions ("to engage in a dialogue") or to invite the Managing Director to participate in discussion.

Accountability is of utmost importance for the European Commission for the completion of the Economic and Monetary Union as President Junker

mentioned. The inclusion of the EMF into the Union's entities is considered to provide political responsibility.

The objective of EMF is to "contribute to safeguarding the financial stability of the euro area, as well as the financial stability of the 'participating Member States' within the meaning of Article 2 of Regulation (EU) No 1024/2013" (Article 3 Statute of the European Monetary Fund).

The purpose of this paper is not to analyse the concept "financial stability" but it is useful to provide several hints for non-experts. In the doctrine the financial stability is considered to be under the influence of the fiscal sustainability (Keliuotytė-Staniulėnienė, 2015, p. 28), which means that sovereign debt and public deficits of the Member States have an important impact on the financial stability. As the EMF's objective is "to contribute to safeguarding the financial stability" it is clear that EMF will act similarly to IMF and will have an important saying in the surveillance of public deficits and debts. Nevertheless, the European Commission is the EU institution in charge with this surveillance according to the Stability and Growth Pact as subsequently modified by the Six-Pack and Two-Pack rules and the Treaty on Stability, Coordination and Governance (Fiscal Compact). If at the beginning of the financial crisis of 2010 EC and IMF together with the European Central Bank (so-called Troika) were getting along and provided financial assistance to Greece, over time tensions appeared and in 2015 IMF decided to withdraw and did not make available to Greece a new loan (Wyplosz, 2017, p. 10). The creation of the EMF looks like that European Commission and the European Parliament decided to replace IMF with an EU institution that will not challenge the EU decisions.

4. THE IMPACT ON THE ROMANIAN FISCAL POLICY

According to the Senate Decision no. 15 of 12 February 2018, the proposal for the adoption of a regulation to establish the European Monetary Fund was considered to be compliant with Article 352 TFEU and all three conditions established in this article are met. The same position had the Italian Senate and the Italian Deputy of Chambers. On the other hand the Senate of the Czech Republic considers that the structure of voting rights is not in favour of "small and medium Member States and without the possibility of an effective control from the national parliaments, whose budgetary power is a fundamental feature of the constitutional systems of EU Member States" (Resolution 413 of the Senate of the Parliament of the Czech Republic, p. 1). This could be the explanation that a decision is not taken yet in the Council. It seems that the Member States cannot agree on the final form of the Regulation.

One could ask if there is an impact of the EMF on Romanian fiscal policy as Romania is not a euro area member. Of course, Romania is not part of the EMS currently and will not be part of EMF. The authors consider that there is an

impact as the EMF will work closely with the European Commission on the budgetary surveillance procedures as established by the current EU rules.

Even if Romania transposed the Six-pack rules and Fiscal Compact in the current legislation, the implementation is not accurate. As mentioned by the European Commission in the 2018 Country Report "the government has been pursuing an expansionary, pro-cyclical fiscal policy, resulting in an increasing fiscal deficit" (SWD(2018) 221 final, p. 15). This type of comments would have impact on the possibility to access EMF funding in the future. Fiscal policy meaning public debt and deficit was quite important and relevant for IMF and for any other lender so it will be relevant for EMF.

As EMF is seen as "fiscal agent of euro-area governments" (Sapir and Shoenmaker, 2017, p. 4) it should be clear that in the future the fiscal policy of Member States will be under the supervision of EMF together with the European Commission. If this is a better solution is time to see until Romania will become a member of the euro area.

5. CONCLUSIONS

The doctrine is divided as the EU Member States do not agree among them. One opinion is that EU has no need to create EMF and the official argument that IMF is too small for EU needs is considered not be valid (Wyplosz, 2017, p. 29). Other authors considers that is very good initiative that would "achieve balance between market discipline and risk sharing" and the creation of EMF would be "part of a wider fiscal institutional reform of the fiscal organisation of the euro, which should be aimed at better managing of sovereign and debt crises" (Sapir and Shoenmaker, 2017, p. 7). It is clear that Member Stated did not reach an agreement in the Council for this fiscal institutional reform and still there are some Member States that consider this reform as an attack to their fiscal sovereignty. It seems that even if the transfer of duties from the Member States to the Union under the regulations regarding budgetary policy, i.e. Stability and Growth Pact and Fiscal Compact operates, the Member States are reluctant to transfer more power at the Union level.

As mentioned above, Romanian Parliament had no comments on the proposed Regulation for the establishment of EMF and it is for the future doctrine to express the actual impact of EMF on the Romanian fiscal policy.

References

1) Case C-370/12, ECLI:EU:C:2012:756, judgment of 27 November 2012.
2) Communication COM(2017) 821 final. Communication from the Commission to the European Parliament, the European Council, the Council and the European Central Bank. Further steps towards completing Europe's Economic and Monetary Union: a roadmap. Brussels, 06.12.2017.

3) Communication COM (2017) 827 final. Proposal for a Council Regulation on the establishment of the European Monetary Fund. Brussels, 06.12.2017.
4) Council Regulation (EU) no. 407/2010 establishing a European financial stabilisation mechanism, JO L 118, 12.5.2010.
5) European Parliament resolution of 16 February 2017 on budgetary capacity for the euro area (2015/2344(INI)).
6) Gros, D. and Mayer, T. (2017). A European Monetary Fund: Why and How?. *CEPS Working Document no. 2017/11*, December 2017. [online] Available at: https://www.ceps.eu/publications/european-monetary-fund-why-and-how [Accessed 30.08.2018].
7) Juncker, J.-C. (2017). *State of the Union Address 2017.* Brussels, 13 September 2017. [online] Available at: http://europa.eu/rapid/press-release_SPEECH-17-3165_en.htm [Accessed 30.08.2018].
8) Keliuotytė-Staniulėnienė, G. (2015). *Fiscal sustainability and its impact on financial stability in Lithuania and other new Member States of the European Union.* Ekonomika, 94(2), pp. 28-46.
9) Resolution 413 of the Senate of the Parliament of the Czech Republic, 11th term, delivered on the session held on 25th April 2018. [online] Available at: http://www.europarl.europa.eu/RegData/docs_autres_institutions/parlements_nationaux/com/2017/0827/CZ_SENATE_CONT1-COM(2017)0827_EN.pdf [Accessed 30.08.2018].
10) Sapir, A. and Shoenmaker, D. (2017). The time is right for a European Monetary Fund. *Policy Policy Brief,* Issue 4, October 2017. [online] Available at: http://bruegel.org/wp-content/uploads/2017/10/PB-2017_04.pdf [Accessed 30.08.2018].
11) Senate Decision no. 15 of 12 February 2018 to the Proposal for a Council Regulation on the establishment of the European Monetary Fund – COM (2017) 827 final, published in the Official Gazette 154 of 19 February 2018.
12) SWD(2018) 221 final. Commission Staff Working Document. Country Report Romania 2018 Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Central Bank and the Eurogroup, 2018 European Semester: Assessment of progress on structural reforms, prevention and correction of macroeconomic imbalances, and results of in-depth reviews under Regulation (EU) No 1176/2011. Brussels, 07.03.2018.
13) T/ESM 2012-LT/ - Treaty Establishing The European Stability Mechanism between the Kingdom of Belgium, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, Malta, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Slovenia, the Slovak Republic and the Republic Of Finland.
14) Wyplosz, C. (2017). *In-Depth Analysis A European Monetary Fund?*. PE 602.076, May 2017. [online] Available at: http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_IDA(2017)602076 [Accessed 30.08.2018].

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EFFECTS OF INTERNAL AUDIT CHARACTERISTICS ON BANK PERFORMANCE

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Abstract
The aim of the paper is to find if the internal audit characteristics have effects on bank performance. The data used in our paper is from 2003 to 2015 period. We conducted an OLS regression on panel data (fixed, random effects and first-difference). We used data from Romanian, Bulgarian, Poland and Albanian commercial banks as reported by Bureau Van Dijk database and categorical variable manually collected by analysing the annual reports of the banks from our sample. The categorical variable reflects the internal audit component for our model Our results showed that there are some statistically significant effects of our categorical variable on bank profitability in all countries and that an independent internal audit committee has an important role for the bank`s performance in our analysed countries
Keywords: *Audit characteristics; Financial Reporting; Bank Profitability.*
JEL Classification: G21, C23

1. INTRODUCTION

When it comes to European Union, the banking sector represents the main channel of financing the economy and its health, soundness and stability affect the economic growth rate and macroeconomic stability (Roman and Bilan, 2015). Moreover, their results showed that an increase of the bank loans to private sector, indicating excessive risk-taking, could lead in increasing non-performing loans rate.

Internal audit plays an important role in the financial institutions activity, specifically in ongoing maintenance and assessment of internal control, risk management and governance system (Basel Committee on Banking Supervision, 2012).

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The international standard for the professional practice of internal auditing 1120 in which "internal auditors must have an impartial, unbiased attitude and avoid any conflict of interest" established by the Institute of Internal Auditors (Institute of Internal Auditors IIA, 2017) presents very clearly that internal auditors must avoid conflict of interests because of the trust position in which they are. The conflict of interests within the internal auditors can weaken confidence in the internal auditors and the audited entity. We consider that if in the internal audit committee composition there is a person from the executive management, this infringes the standards 1100 in which "the internal audit activity must be independent, and internal auditors must be objective in performing their work" and 1120 (Institute of Internal Auditors IIA, 2017) and then the conflict of interests occurs in the internal audit activity. Thus, we consider necessary to analyse if in practice the financial institutions respect or violate these standards and to highlight the implications of the internal audit conflict of interests on financial institutions performance.

This paper is organised as follows: Section 2 presents the literature on internal audit and effects on profitability; Section 3 presents data and methodology; Section 4 provides the results and Section 5 presents the conclusions.

2. LITERATURE REVIEW ON INTERNAL AUDIT AND EFFECTS ON PROFITABILITY

There are a number of prior studies that examine the internal audit independence, focusing on the composition of the internal audit committee. Abbott, Park and Parker (2000) found that an internal audit committee that is composed only of independent directors and which meet twice per year are less likely to mislead reporting or to be sanctioned for fraudulent reporting. Furthermore independent audit committees are less likely to be associated to internal control problems (Krishnan, 2005).

In banking organization, the collaboration between banking supervisors, external auditors and internal auditors is very important in improving the effectiveness of their work (Dumitrescu, 2004). By increasing the effectiveness of these activities, we can say that it can increase the effectiveness of the bank, and thus the profitability, in accordance with corporate governance principles (Onofrei, Oprea and Anton, 2015).

Regarding the independence of the internal audit committee, we consider that the independence of the internal audit is the key of ensuring audit quality, thus our research is based on analysing the implications of a possible conflict of interest regarding the audit function if the audit committee has in composition one or more managers of the company. Moreover regarding the internal auditors dual role (monitoring and advising), there are some situations in which the internal auditors may see the line managers as their clients. This situation may lead to incorrect actions resulting from audit findings and may create conflict of

interest because they do not want to interrupt the client relationship with management (Houston and Peters, 1999). The involvement of the internal audit in consulting activities, next to independence, assurance and objectivity (Institute of Internal Auditors IIA, 2011), may lead to lower objectivity (Galloway, 1995). Thus, Brody and Lowe (2000) found that internal auditor's judgement favoured their employee, whether he is a buyer or a seller, in the case of an acquisition. Moreover Brody, Haynes and White (2014) still found that internal auditors could not remain objective regarding the subsidiary acquisition scenario in a way in which "internal auditors assessed the likelihood of inventory obsolescence as higher when consulting for the buyer than when consulting for the seller". Therefore, it is critical for the internal auditors to remain objective and independent members of the organization in order to produce added value to the organization and increase performance (Brody and Lowe, 2000).

Audit committee plays a key role in assisting the board of directors in overseeing corporate management and is influential for participants in corporate governance (Bedard and Gendron, 2010). Sun and Liu (2014) found that high effectiveness of the audit committee is constraining bank risk-taking activities. Using a sample of 298 financial firms, over the period between 2008 and 2010. The authors documented that "firm performance is more positively associated with bank risk for banks with long board tenure, more female audit committee members, or large size audit committees than for other banks, consistent with the notion that audit committee effectiveness may increase risk management effectiveness" (Sun and Liu, 2014).

An independent internal audit reduces the possibilities of management in withholding information for personal use and thus avoiding conflict of interests and fraud (Allegrini and Greco, 2011).

Audit committees improve the financial reporting process, the quality of financial statements and disclosure (McMullen, 1996), thus an independent audit committee contributes to higher performance. An independent audit committee has a positive impact on fulfilling the needs of the investors to have accurate information on the company (Khlif and Samaha, 2014; Samaha *et al.*, 2012; Arcay and Vazquez, 2005).

In order to analyze the effects of internal audit characteristics on bank profitability, we tested the following hypothesis:

H.0.1: Non-independent internal audit committee has a negative effect on bank profitability ($\delta 1=0$).

3. DATA AND METHODOLOGY

3.1 Sample description

Table 1. Variables definition

Variable	Description	Data source
Dependent variable		
ROAA	The return on average total assets of the banks (%). ROAA calculated as net income divided by average total assets	Bureau Van Dijk database
ROAE	The return on average equity is defined as net income by average total equity	Bureau Van Dijk database
Internal audit characteristics		
IAC	Internal audit conflict. Dummy variable equal to 1 for conflict of interest in internal audit committee and 0 if not.	Hand- collected data
Bank characteristics		
EA	Capital adequacy of a bank, measured by equity to asset ratio	Bureau Van Dijk database
LLR	Loan loss reserve to gross loans	Bureau Van Dijk database
CIR	Cost to income ratio calculated as the operating costs over total income	Bureau Van Dijk database
LIQA	Liquidity ratio (cash and due from banks+ available for sale securities + government securities) to total assets.	Bureau Van Dijk database
FC	Founding costs. Interest expense on customer deposits as a percentage of average customer deposits	Bureau Van Dijk database
NIIR	Income diversification of bank,calculated as non-interest income over total gross revenues	Bureau Van Dijk database
LNTA	Bank size is measured by the natural logarithm of the accounting value of the total assets of bank	Bureau Van Dijk database
GDP	GDP per capita growth (annual %)	Bureau Van Dijk database
INF	The annual inflation rate (consumer prices)	Bureau Van Dijk database
DCPSB	Domestic bank credit to private sector (% of GDP)	Bureau Van Dijk database
CR	Banking industry concentration, calculated as the assets of the five largest banks over total commercial banking assets (%)	Bureau Van Dijk database

Source: authors' definition

In Table 1, we present our variable description. Our data is composed of two dependent variables (ROAA and ROAE) and twelve independent variables from which our interest variable is the internal audit conflict (IAC) variable. IAC measures the independence of the internal audit committee in which 1 represents the presence of an executive manager in the audit committee and 0 represents the

independence of the internal audit committee.

Our data is composed of 51 commercial banks (presented in Appendix 1) from Romania, Bulgaria, Poland and Albania for a period from 2003 to 2015. A brief description of the database, used as base for statistical calculations, is presented in Table 2.

Table 2. Descriptive statistics of the variables

vars	n	mean	sd	median	trimmed	mad	min	max	range	skew	kurtosis	se
1	702	0.0098	0.011	0.0095	0.0097	0.0096	-0.0237	0.042	0.065	0.040	0.37	0.0004
2	702	0.0935	0.098	0.0956	0.0954	0.0863	-0.1914	0.410	0.602	-0.132	0.55	0.0037
3	702	0.1119	0.038	0.1078	0.1091	0.0358	0.0357	0.280	0.244	0.891	1.44	0.0014
4	702	0.6449	0.184	0.6314	0.6343	0.1723	0.1442	1.337	1.193	0.620	1.02	0.0070
5	702	0.2844	0.162	0.2532	0.2683	0.1431	0.0089	0.909	0.900	0.964	0.78	0.0061
6	702	0.0377	0.018	0.0346	0.0359	0.0128	0.0014	0.099	0.098	0.985	1.12	0.0007
7	702	0.3444	0.134	0.3372	0.3420	0.1491	-0.0206	0.849	0.869	0.247	-0.16	0.0051
8	702	0.0911	0.014	0.0897	0.0911	0.0155	0.0463	0.125	0.079	-0.056	-0.46	0.0005
9	702	0.0516	0.039	0.0391	0.0459	0.0283	0.0022	0.167	0.165	1.194	0.63	0.0015
10	702	0.5452	0.079	0.5366	0.5365	0.0503	0.4337	0.754	0.321	0.894	0.44	0.0030
11	702	0.0409	0.029	0.0394	0.0419	0.0265	-0.0570	0.098	0.154	-0.659	1.42	0.0011
12	702	0.0374	0.029	0.0333	0.0347	0.0220	-0.0114	0.135	0.147	0.962	0.95	0.0011
13	702	0.4263	0.145	0.3921	0.4168	0.1638	0.1561	0.754	0.598	0.522	-0.43	0.0055

Source: authors' own calculations

As the descriptive statistics of the variables suggest 42.63% of our banks have a non- independent internal audit committee.

Because of the absence of data for some banks in our dataset, these banks have a different period than other banks. Bank names and available period are presented in Appendix 1.

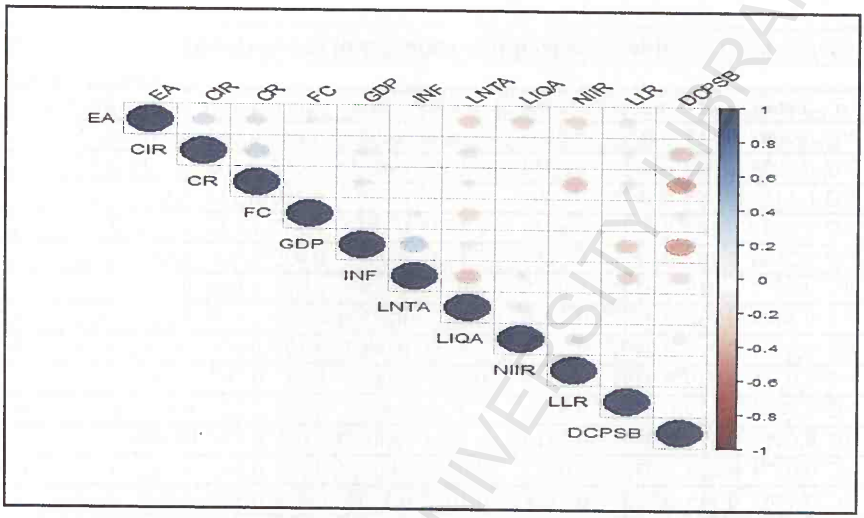
Table 3. The Pearson's correlation matrix

	EA	CIR	LIQA	FC	NIIR	LNTA	LLR	CR	GDP	INF	DCPSB
EA	1										
CIR	0.25	1									
LIQA	-0.24	-0.04	1								
FC	0.11	-0.04	-0.04	1							
NIIR	-0.22	0.05	0.17	-0.1	1						
LNTA	-0.24	-0.18	0.14	-0.22	0.08	1					
LLR	0.14	-0.12	0.06	-0.08	0.04	0.06	1				
CR	0.2	0.29	-0.03	-0.03	-0.3	0.12	-0.14	1			
GDP	-0.02	0.11	-0.01	0.05	0.04	-0.15	-0.28	0.15	1		
INF	0	-0.01	0.11	0.11	-0.04	-0.31	-0.25	-0.01	0.34	1	
DCPSB	-0.02	-0.29	-0.14	-0.14	-0.1	-0.03	0.07	-0.42	-0.43	-0.19	1

Source: authors' own calculations

The Pearson's correlation matrix is available in Table 3. A visual representation of The Pearson's correlation matrix is available in Figure 1.

Figure 1: The Pearson's correlation matrix graphical representation



The correlation matrix suggests that there are no correlation problems between our independent variables as the largest correlation is -0.43 between DCPSB (Domestic bank credit to private sector (% of GDP)) and GDP (GDP per capita growth (annual %)).

3.2 Methodology

The panel data model is described through some restrictions such as parameter homogeneity, for all *i,t*, applied to the general model (equation 1), resulting a linear model pooling all the data across *i* and *t* (equation2). To model individual heterogeneity, the error term has two separate components (one of which is specific to the individual) and does not change over time (equation 3). In the case of *fixed* or *random* effects models: the estimation depends on the properties of the error component, which may be either uncorrelated with the regressors (*random effects* model) or correlated (*fixed effects, within* or *least squares dummy variables* model).

$$y_{it} = \alpha_{it} + \beta_{it}^{T} x_{it} + u_{it} \quad (1)$$

$$y_{it} = \alpha + \beta^{T} x_{it} + u_{it} \quad (2)$$

$$y_{it} = \alpha + \beta^{T} x_{it} + u_{i} + \varepsilon_{it} \quad (3)$$

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When time specific components are taken into consideration (e.g. Year) the error has three components:

$$u_{it} = u_i + \lambda_t + \epsilon_{it} \quad (4)$$

The individual component may be in turn either independent of the regressors or correlated.

If it is correlated, the ordinary least squares (OLS) estimator of would be inconsistent, so it is customary to treat the u_i as a further set of n parameters to be estimated, as if in the general model $\alpha_{it} = \alpha_i$ for all t. This is called the fixed effects (a.k.a. within or least squares dummy variables) model, usually estimated by OLS on transformed data, and gives consistent estimates.

Our fixed effects equation becomes:

$$ROAA_{it} = \beta_1 EA + \beta_2 CIR + \beta_3 LIQA + \beta_4 FC + \beta_5 NIIR + \beta_6 lnTA + \beta_7 LLR + \beta_8 CR + \beta_9 GDP + \beta_{10} INF + \beta_{11} DCPSB + \beta_{12} IAC + u_i + e_{it} \quad (5)$$

$$ROAE_{it} = \beta_1 EA + \beta_2 CIR + \beta_3 LIQA + \beta_4 FC + \beta_5 NIIR + \beta_6 lnTA + \beta_7 LLR + \beta_8 CR + \beta_9 GDP + \beta_{10} INF + \beta_{11} DCPSB + \beta_{12} IAC + u_i + e_{it} \quad (6)$$

Our random effects equation becomes:

$$ROAA_{it} = \propto + \beta_1 EA + \beta_2 CIR + \beta_3 LIQA + \beta_4 FC + \beta_5 NIIR + \beta_6 lnTA + \beta_7 LLR + \beta_8 CR + \beta_9 GDP + \beta_{10} INF + \beta_{11} DCPSB + \beta_{12} IAC + u_{it} + e_{it} \quad (7)$$

$$ROAE_{it} = \alpha + \beta_1 EA + \beta_2 CIR + \beta_3 LIQA + \beta_4 FC + \beta_5 NIIR + \beta_6 lnTA + \beta_7 LLR + \beta_8 CR + \beta_9 GDP + \beta_{10} INF + \beta_{11} DCPSB + \beta_{12} IAC + u_{it} + e_{it} \quad (8)$$

Where:

u_i is the unknown intercept for each entity;
e_{it} is the error term (idiosyncratic errors);
α – constant.

1. *Bank specific variables (used as control variables):*
EA (Capital adequacy);
LLR (Loan loss reserves rate);
CIR (Management Quality);
LIQA (Liquidity);
FC (funding costs);
NIIR (Income diversification of bank) and
LNTA (Bank size).
2. *Macroeconomic factors (used as control variables):*
GDP (Economic Activity);
INF (Inflation); DCPSB (Domestic credit) and
CR (banking industry concentration).

3. *Internal audit characteristics (our interest variable):*
IAC (internal audit conflict).

3.3 Tests

We used {car} package (Fox and Weisberg, 2011) in Rstudio (RStudio Team, 2016; R Core Team, 2016) to control multicollinearity and calculate VIF's. The results are presented in Table 4.

Table 4. The VIF's values

EA	CIR	LIQA	FC	NIIR	LNTA	LLR	CR	GDP	INF	DCPSB	IAC
1.339	1.5927	1.1792	1.7173	1.6271	1.5033	1.3437	2.0481	1.5533	1.7909	1.792	1.6576
1.339	1.5927	1.1792	1.7173	1.6271	1.5033	1.3437	2.0481	1.5533	1.7909	1.792	1.6576

Source: authors' own calculations

As Table 4 suggests, there are no multicolliniarity problems for our models. We used {plm} package (Croissant and Millo, 2008) in Rstudio (RStudio Team, 2016) to perform specific tests (test to compare individual and time effects, to compare the fixed and the random effects, tests for serial correlation).

The results of the tests for individual and time effects are presented in Table 5.

Table 5. Tests for individual and time effects' results

Test name	statistic	p.value
plmtest.pooling.ROAA	12.0353	0.0000
plmtest.pooling.ROAE	9.9484	0.0000

Source: authors' own calculations

The results of Hausman test (Table 6) suggest that the fixed effects model is more adequate than the random effects model.

Table 6. Hausman test results

Test name	statistic	p.value	parameter	method
phtest.plm.ROAA	37	0.00025	12	Hausman Test
phtest.plm.ROAE	30	0.0024	12	Hausman Test

Source: authors' own calculations

Test name	statistic	parameter	p.value
pwfdtest.plm.fd.ROAA	17	1, 394	0.000
pwfdtest.plm.fd.ROAE	21	1, 394	0.000
pwfdtest.plm.fe.ROAA	3	1, 394	0.082
pwfdtest.plm.fe.ROAE	3.1	1, 394	0.081

Source: authors' own calculations

4. RESULTS

In the Table 7 and Table 8, we present our panel data regression result for fixed, random effects and first-difference.

Table 7. Data panel regression results for dependent variable ROAE

Data Panel regression Results								
	Dependent variable: ROAA, ROAE							
	within. ROAA	within. ROAE	within. twoways. ROAA	within. twoways. ROAE	random. ROAA	random. ROAE	fd.ROAA	fd.ROAE
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
EA	0.0413**	-0.4524***	0.0584***	-0.2629	0.0395***	-0.3418***	0.1032***	0.2715
	(0.0161)	(0.1659)	(0.0167)	(0.1709)	(0.0132)	(0.1298)	(0.0204)	(0.2131)
CIR	-0.0298***	-0.2828***	-0.0282***	-0.2681***	-0.0327***	-0.3166***	-0.0273***	-0.2522***
	(0.0027)	(0.0279)	(0.0027)	(0.0282)	(0.0026)	(0.0257)	(0.0033)	(0.0347)
LIQA	0.0050**	0.0701***	0.0053**	0.0708***	0.0045**	0.0718***	0.0050*	0.0582**
	(0.0022)	(0.0227)	(0.0025)	(0.0252)	(0.0021)	(0.0212)	(0.0027)	(0.0287)
FC	-0.0092	0.0296	-0.0162	-0.2291	-0.0344	-0.2370	0.0124	-0.0165
	(0.0247)	(0.2546)	(0.0274)	(0.2804)	(0.0239)	(0.2420)	(0.0335)	(0.3508)
NIIR	0.0088**	0.0925**	0.0067	0.0528	0.0121***	0.1097***	0.0103**	0.1277**
	(0.0041)	(0.0428)	(0.0043)	(0.0438)	(0.0037)	(0.0363)	(0.0051)	(0.0531)
LNTA	0.0832	1.1313	0.0917	1.3135*	0.0014	0.1058	0.1548	1.5517
	(0.0714)	(0.7365)	(0.0716)	(0.7336)	(0.0433)	(0.4121)	(0.0948)	(0.9916)
LLR	-0.1036***	-0.9212***	-0.0960***	-0.8025***	-0.1003***	-0.8632***	-0.1471***	-1.3589***
	(0.0118)	(0.1219)	(0.0127)	(0.1302)	(0.0107)	(0.1068)	(0.0199)	(0.2078)
CR	0.0134*	0.1015	0.0199**	0.1019	0.0040	0.0819	0.0244**	0.1821
	(0.0081)	(0.0835)	(0.0095)	(0.0970)	(0.0068)	(0.0674)	(0.0109)	(0.1143)
GDP	0.0440***	0.5730***	0.0199	0.3423*	0.0543***	0.6761***	0.0501***	0.5848***
	(0.0120)	(0.1234)	(0.0193)	(0.1981)	(0.0119)	(0.1215)	(0.0112)	(0.1168)
INF	0.0412***	0.3412**	0.0294	0.1370	0.0432***	0.3677**	0.0146	0.0583
	(0.0147)	(0.1513)	(0.0183)	(0.1878)	(0.0141)	(0.1429)	(0.0177)	(0.1856)
DCPSB	-0.0214***	-0.1617***	-0.0320***	-0.1548*	-0.0139***	-0.0898***	-0.0145**	-0.0455
	(0.0041)	(0.0428)	(0.0089)	(0.0913)	(0.0033)	(0.0332)	(0.0070)	(0.0728)
IACYES	-0.0038	-0.0907***	-0.0039*	-0.0892***	-0.0042**	-0.0536***	-0.0010	-0.0440
	(0.0023)	(0.0241)	(0.0023)	(0.0239)	(0.0019)	(0.0186)	(0.0037)	(0.0390)
Constant					0.0278***	0.2800***		
					(0.0065)	(0.0642)		
Observations	496	496	496	496	496	496	446	446
R^2	0.4915	0.4887	0.3683	0.3177	0.4805	0.4749	0.3147	0.2676
Adjusted R^2	0.4200	0.4168	0.2591	0.1996	0.4676	0.4619	0.2973	0.2491
F Statistic	34.9570*** (df = 12; 434)	34.5656*** (df = 12; 434)	20.5052*** (df = 12; 422)	16.3711*** (df = 12; 422)	37.2167*** (df = 12; 483)	36.4038*** (df = 12; 483)	18.1055*** (df = 11; 434)	14.3723*** (df = 11; 434)

Note: *p<0.1; **p<0.05; ***p<0.01

Table 8. Data panel regression results for dependent variable ROAA

Robust Standard Errors for Panel Regressions with Cross-Sectional Dependence								
	Dependent variable: ROAA, ROAE							
	vcovSCC. within. ROAA	vcovSCC. within. ROAE	vcovSCC. within.twoways .ROAA	vcovSCC. within.twoways. ROAE	vcovSCC. random. ROAA	vcovSCC. random. ROAE	vcovSCC .fd.ROAA	vcovSCC. fd.ROAE
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
EA	0.0413***	-0.4524***	0.0584***	-0.2629*	0.0395***	-0.3418*	0.1032***	0.2715*
	(0.0135)	(0.1686)	(0.0108)	(0.1508)	(0.0065)	(0.1828)	(0.0110)	(0.1480)
CIR	-0.0298***	-0.2828***	-0.0282***	-0.2681***	-0.0327***	-0.3166***	-0.0273***	-0.2522***
	(0.0034)	(0.0471)	(0.0031)	(0.0414)	(0.0029)	(0.0392)	(0.0042)	(0.0546)
LIQA	0.0050***	0.0701***	0.0053***	0.0708***	0.0045***	0.0718***	0.0050	0.0582
	(0.0016)	(0.0202)	(0.0018)	(0.0160)	(0.0014)	(0.0232)	(0.0035)	(0.0425)
FC	-0.0092	0.0296	-0.0162	-0.2291	-0.0344*	-0.2370	0.0124	-0.0165
	(0.0208)	(0.2327)	(0.0245)	(0.2531)	(0.0208)	(0.1950)	(0.0340)	(0.3186)
NIIR	0.0088*	0.0925*	0.0067	0.0528	0.0121***	0.1097**	0.0103*	0.1277***
	(0.0046)	(0.0514)	(0.0048)	(0.0532)	(0.0040)	(0.0434)	(0.0055)	(0.0490)
LNTA	0.0832*	1.1313***	0.0917**	1.3135***	0.0014	0.1058	0.1548**	1.5517*
	(0.0465)	(0.4261)	(0.0447)	(0.4573)	(0.0304)	(0.3507)	(0.0617)	(0.7935)
LLR	-0.1036***	-0.9212***	-0.0960***	-0.8025***	-0.1003***	-0.8632***	-0.1471***	-1.3589***
	(0.0112)	(0.0948)	(0.0137)	(0.1085)	(0.0079)	(0.0697)	(0.0350)	(0.3200)
CR	0.0134	0.1015	0.0199*	0.1019	0.0040	0.0819	0.0244	0.1821
	(0.0084)	(0.0964)	(0.0119)	(0.1316)	(0.0070)	(0.0630)	(0.0152)	(0.2008)
GDP	0.0440***	0.5730***	0.0199	0.3423**	0.0543***	0.6761***	0.0501***	0.5848***
	(0.0139)	(0.1568)	(0.0151)	(0.1336)	(0.0111)	(0.1321)	(0.0090)	(0.1170)
INF	0.0412***	0.3412**	0.0294	0.1370	0.0432***	0.3677***	0.0146	0.0583
	(0.0128)	(0.1602)	(0.0189)	(0.1939)	(0.0098)	(0.1194)	(0.0133)	(0.1518)
DCPSB	-0.0214***	-0.1617***	-0.0320***	-0.1548**	-0.0139***	-0.0898*	-0.0145***	-0.0455
	(0.0056)	(0.0465)	(0.0067)	(0.0646)	(0.0048)	(0.0472)	(0.0050)	(0.0636)
IACYES	-0.0038**	-0.0907***	-0.0039**	-0.0892***	-0.0042**	-0.0536*	-0.0010	-0.0440
	(0.0018)	(0.0275)	(0.0018)	(0.0290)	(0.0021)	(0.0290)	(0.0041)	(0.0458)
Constant					0.0278***	0.2800***		
					(0.0067)	(0.0894)		
Observations	496	496	496	496	496	496	446	446
R^2	0.4915	0.4887	0.3683	0.3177	0.4805	0.4749	0.3147	0.2676
Adjusted R^2	0.4200	0.4168	0.2591	0.1996	0.4676	0.4619	0.2973	0.2491
F Statistic	34.9570*** (df = 12; 434)	34.5656*** (df = 12; 434)	20.5052*** (df = 12; 422)	16.3711*** (df = 12; 422)	37.2167*** (df = 12; 483)	36.4038*** (df = 12; 483)	18.1055*** (df = 11; 434)	14.3723*** (df = 11; 434)

Note: *p<0.1; **p<0.05; ***p<0.01

Our hypothesis *H.0.1: Non-independent internal audit committee has a negative effect on bank profitability (δ1=0)*, is accepted at 0.01 level for ROAA and 0.05 level for ROAE. If the same person is at the same time member of the audit committee and management board (IAC), our findings imply that the bank profitability expressed by ROAA diminishes by 0.0039 (±0.0018), and ROAE is lower by 0.0892 (±0.0290). This suggests that the profitability is higher in banks

with independent members in the audit committee. The findings of our study are in line with other studies (Khlif and Samaha, 2014; McMullen, 1996; Samaha, Khlif and Hussainey, 2015), in which an independent audit committee has a positive impact on fulfilling the needs of investors to have accurate information on the company and contributes to higher performance. Furthermore, we agree that independent internal auditors are less likely to mislead reporting or be sanctioned for fraudulent reporting (Abbott, Park and Parker 2000) and are less likely to be associated to internal control problems (Krishnan, 2005) leading to greater performance.

5. CONCLUSIONS

We analysed the effects of the internal audit committee composition on 51 banks from four emerging markets (Romania, Poland, Bulgaria and Albania) from 2003-2015 period. Our finding show that if there is an executive manager as a member in the internal audit committee (representing in our paper the internal audit conflict of interest, IAC variable) then there is a negative and statistically significant effect on the bank`s profitability. The conflict of interest in the internal audit activity violates the standards 1100 in which "the internal audit activity must be independent, and internal auditors must be objective in performing their work" and 1120 (Institute of Internal Auditors IIA, 2017) in which "internal auditors must have an impartial, unbiased attitude and avoid any conflict of interest". Thus, independent members in the audit committee are less likely to mislead reporting and create conflict of interest conducting to better risk management and internal control system and thus, greater performance.

References

1) Abbott, L.J., Park, Y. and Parker, S. (2000). The Effects of Audit Committee Activity and Independence on Corporate Fraud. *Managerial Finance,* 26(11), pp. 55-67.
2) Allegrini, M. and Greco, G. (2011). Corporate boards, audit committees and voluntary disclosure: evidence from Italian Listed Companies. *Journal of Management and Governance*, 15(3), pp. 1-30.
3) Arcay, M. B. and Vazquez, M. (2005). Corporate characteristics, governance rules and the extent of voluntary disclosure in Spain. *Advances in Accounting*, 21, pp. 299–331.
4) Basel Committee on Banking Supervision, (2012). *The internal audit function in banks.* [online] Available at: https://www.bis.org/publ/bcbs223.pdf [Accessed 04.04.2018].
5) Bedard, J. and Gendron, Y. (2010). Strengthening the financial reporting system: Can audit committees deliver?. *International Journal of Auditing,* 14(2), pp. 174-210.
6) Brody, R.G. and Lowe, D.J. (2000). The new role of the internal auditor: Implications for internal auditor objectivity. *International Journal of Auditing*, 4(2), pp. 169–176.
7) Brody, R.G., Haynes, C.M. and White, C. (2014). The impact of audit reforms on objectivity during the performance of non-audit services. *Managerial Auditing Journal*, 29 (3), pp. 222–236.

8) Croissant, Y and Millo, G. (2008). Panel Data Econometrics in R: The plm Package. *Journal of Statistical Software*, 27(2), pp.1-43.
9) Dumitrescu, M.I.-B. (2004). Internal Audit in Banking Organisations. *Commercial banking, Internal Audit in Banking Organisations*, 12(7), pp. 16-19.
10) Fox, J. and Weisberg, S. (2011). *An {R} Companion to Applied Regression,* 2nd ed. Thousand Oaks CA: Sage.
11) Galloway, D. (1995). *A Guide for the New Auditor*. Altamonte Springs, FL: The Institute of Internal Auditors.
12) Houston, R.W. and Peters, M.F. (1999). The impact of internal auditor role and compensation on external auditors' planning judgments and decisions. *Working paper,* University of Alabama.
13) Institute of Internal Auditors (IIA), (2011). *Independence and Objectivity. IPPF Practice Guide.* Altamonte Springs, FL: The IIA Research Foundation (IIARF).
14) Institute of Internal Auditors (IIA), (2017). *International standards for the professional practice of internal auditing (standards).* [online] Available at: https://na.theiia.org/standards-guidance/Public%20Documents/IPPF-Standards-2017.pdf [Accessed 04.04.2018].
15) Krishnan, J. (2005). Audit Committee Quality and Internal Control: An empirical Analysis. *The Accounting Review,* 80(2), pp. 649-675.
16) Khlif, H. and Samaha, K. (2014). Internal control quality, Egyptian standards on auditing and external audit delays: Evidence from the Egyptian Stock Exchange. *International Journal of Auditing*, 18(2), pp.139–154.
17) McMullen, D.A. (1996). Audit Committee Performance: An Investigation of the Consequences Associated with Audit Committees. *Auditing: A Journal of Practice & Theory,* 15(1), pp. 87-103.
18) Onofrei, M., Oprea, F. and Anton, S. (2015). Comparative Analysis of the Implementation of the Corporate Governance Principles in the Central and East European Countries. In: A. Roman, S. Anton and I. Bilan, eds., *Euro and the European Banking System: Evolutions and Challenges.* Iaşi: Alexandru Ioan Cuza University Publishing House, pp. 728-742.
19) R Core Team, (2016). *R: A Language and Environment for Statistical Computing.* Vienna: R Foundation for Statistical Computing. [online] Available at: https://www.R-project.org/ [Accessed 04.03.2018].
20) RStudio Team, (2016). *RStudio: Integrated Development for R.* Boston, MA: RStudio, Inc. [online] Available at: http://www.rstudio.com/ [Accessed 04.03.2018].
21) Roman, A. and Bilan, I. (2015). An empirical analysis of the macroeconomic determinants of non-performing loans in EU28 banking sector. *Revista Economică*, 67(2), pp. 108-127.
22) Samaha, K., Khlif, H. and Hussainey, K. (2015). The impact of board and audit committee characteristics on voluntary disclosure: A meta-analysis. *Journal of International Accounting, Auditing and Taxation,* 24(C), pp. 13-28.
23) Samaha, K., Dahawy, K., Abdel-Meguid, A. and Abdallah, S. (2012). Propensity and comprehensiveness of corporate internet reporting in Egypt: Do board composition and ownership structure matter?. *International Journal of Accounting and Information Management*, 20(2), pp. 142–170.
24) Sun, J. and Liu, G. (2014). Audit committees' oversight of bank risk-taking. *Journal of Banking & Finance*, 40, pp. 376-387.

Appendixes

Appendix 1. Banks and analysed period

Bank	begin	end
AIG Bank Polska SA	2010	2015
Allianz_Bank_Bulgaria_AD_CB	2007	2015
Alpha Bank Romania	2003	2015
Banca Comerciala CARPATICA	2005	2015
Banca Comerciala Romana	2003	2015
Banca Romaneasca	2008	2015
Banca Transilvania	2004	2015
Bancpost	2008	2015
Bank BPH SA	2003	2015
Bank Handlowy w Warszawie	2008	2015
Bank Millennium	2003	2015
Bank Ochrony Srodowiska SA	2005	2015
Bank Pekao SA	2003	2015
Bank Pocztowy	2009	2015
Bank Polskiej Spoldzielczosci SA	2005	2015
Bank Zachodni WBK	2003	2015
Banka Kombetare Tregtare Sh.s.	2004	2015
Banka Societe Generale Albania Sh.A	2008	2015
BRD Groupe Societe Generale	2003	2015
BRE Bank SA	2003	2015
BRE Bank SA MbANK	2013	2013
Bulgarian_Development_Bank_AD	2010	2015
CEC Bank	2013	2015
DSK_Bank	2004	2015
Emporiki Bank - Albania SA	2010	2015
First_Investment_Bank	2006	2015
ING Bank Slaski S.A.	2003	2015
International Commercial Bank	2010	2015
Intesa Sanpaolo Bank Albania	2005	2015
Kredyt Bank SA	2010	2015
MKB_Unionbank_AD	2006	2015
Municipal Bank Plc	2003	2015
Nordea Bank Polska SA	2009	2015
OTP Bank Romania	2006	2015
Pekao Bank Hipoteczny Sa	2003	2015
Piraeus Bank Romania	2006	2015
PKO BP SA	2003	2015
Postbank	2003	2015

Bank	begin	end
ProCredit Bank	2003	2015
Procredit_Bank_AD	2003	2015
Raiffeisen Bank Romania	2003	2015
Raiffeisenbank	2003	2015
RBS Bank Polska	2010	2015
RBS Bank Romania	2008	2015
Societe_General_Expressbank AD	2005	2015
Tirana Bank SA	2009	2015
UniCredit Tiriac	2007	2015
UNICREDIT_Bulbank	2003	2015
Union Bank Sh.a.	2010	2015
United_Bulgaria_Bank_UBB	2006	2015
Veneto Banka Sh.a.	2010	2015

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LEGALIZATION OF RISK NOTIONS IN BANK CREDIT AGREEMENTS

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Abstract
The institution of hardship is a remedy for the contractual imbalance, and it should not be or become a remedy for the imbalance between the property of the debtor and the property of the creditor, as it is intended to protect the contractual debtor.
The giving in payment, as matter of principle, involves risk-sharing between debtor and creditor, if the debtor is unable to pay, by giving up the property, with the consequence that the debt is discharged. Therefore, the debtor must be in a situation of inability to pay.
Although art. 4 of Law no. 77/2016 regulates the conditions for the establishment of the right to settle the claim arising from a credit agreement and its accessories by the giving in payment of the immovable property, as a result of the Constitutional Court Decision no. 623/2016, the law can no longer be applied without making a distinction between debtors acting in good faith and those acting in bad faith.
It remains to be seen how the courts will find the most adequate and correct variants of harmonization of the hardship mechanism with the specificity of the forced giving in payment, as well as the general rules of giving in payment provided for by the Civil Code.
Meanwhile, the notion of risk applicable to banking business seems to leave its well-known path in the credit contracts and face a legalization process to protect the consumer's rights. In analyzing this phenomenon our article will also focus on the analysis of risk sharing, the EU Regulation no 575/2013, the National Bank regulations concerning credit risks and the relevant Court of Justice of the European Union case law.
Keywords: *inability to pay; division of risks; legalization; division of benefits; contractual imbalance in relation to own investment; binding force of agreement; incapacity of execution; stage negotiations.*
JEL Classification: K12, K22, K35, G21

1. THE LEGAL AND NON-LEGAL RISKS OF THE BANK CREDIT AGREEMENT

The credit operations are regulated mainly by the Government Emergency Ordinance no. 99/2006 on credit institutions and capital adequacy. The purpose of the law is to regulate mainly the conditions of access and the activity of credit institutions, but, however, the normative act also establishes rules relevant to the contractual credit relations. For example, art. 1172 provides that credit

institutions may only deal with customers on a contractual basis and that credit institutions cannot claim interest, penalties, commissions or other charges and bank charges on the client if their payment is not stipulated in the contract. The rationale of regulatory efforts in recent years, both at national and European level, has made several legal provisions applicable to the credit agreement included in consumer legislation (e.g. Emergency Ordinance of the Government no. 50/2010 on Consumer Credit Contracts, Government Emergency Ordinance No. 52/2016 on Consumer Credit Contracts for Real Estate, as well as for amending and supplementing Government Emergency Ordinance No. 50/2010 on Consumer Credit Contracts). Thus, the meaning of the term "credit agreement" is established by art. 3 point 3 of O.U.G. no. 52/2016 and art. 7 point 2 of O.U.G. no. 50/2010, which states that it is the "contract by which a creditor grants, promises or stipulates the possibility to grant a consumer credit in the form of payment deferral, loan or other similar financial facilities, with the exception of contracts on continuous service for the supply of goods of the same kind where the consumer pays for such services or goods in installments during their supply".

Several definitions of the credit agreement are formulated in the literature but, economically speaking, an important feature of the existence of a regular exchange of present goods for future goods is that a certain number of monetary units cease to be at the disposal of the creditor and become available to the debtor for a predetermined period (Piedelièvre, 2008).

Of course, the credit agreement is a variety of the consumer loan agreement, that is to say, that a person, the lender, transfers to another person, called the borrower, the right to ownership of (genuinely and consumable) the purpose of using them (consuming), with the obligation of the latter to return to the agreed term things of the same nature, quality and quantity. The headquarters of the legal norms regulating this variety of the loan contract are marked by art. 2.158-2.170 of the new Civil Code.

But what interests us is not the formulation of a definition, but the nature of the contract. Interest-bearing money is a kind of consumer loan. According to the current civil legal rules, current stipulations regarding the loan interest apply "whenever, pursuant to a contract arises an obligation of payment within a given term, of a sum of money or other goods as long as there are no particular rules regarding the validity and execution of that obligation" (Article 2.167 of the Civil Code). The basis of the contract illustrated in this subsection is governed by a variety of provisions in distinct normative acts. Therefore, we find provisions in the Civil Code in Art. 2.167 - 2.170, art. 1.535 on moral damages, art. 1.538-1.543 on the penalty clause, corroborated with those in G.O. no. 13/2011 on the legal interest payable and penalizing for monetary obligations, as well as for the regulation of financial-fiscal measures in the banking field, as well as other formal sources. Last but not least, we mention the particular

provisions applicable in the case of loans which are of a general nature. The specific nature of this convention consists of the double object of the benefits due to the borrower, namely the return of capital and the return of legal or conventional interest. It is certain that the borrower is the one who receives a sum of money, and the lender is the one who transfers a sum of money to the debtor in exchange for his commitment to repay the amount received in the future plus the cost of financing. For the debtor the credit price cannot be below a minimum level, which must cover the creditor's costs in full. Interest is an equivalent of the use of borrowed funds and represents civilian "fruit" produced by the borrowed good (Silberstein, 2017).

As regards the transfer of risks on the borrowed items, Art. 2.160 of the Civil Code states that "by the valid conclusion of the contract, the borrower becomes the owner of the property and bears the risk of losing it." This precept is in full compliance with the res perit domino principle, as the Consumer Loan Agreement has as its derived object goods of a kind (fungible, consumable) so that, with the material redemption of the borrowed things, the right to ownership thereof is transmitted to the borrower, forcing him to return goods in the same quantity and quality.

As far as the legal concept of contract risk is concerned, it refers to who bears the risk of impossibility to execute the contract under the stipulated conditions, namely, who bears the risk of forcible impossibility of performance of the contract. In the event of impossibility to execute the contract, art. 1.634 para (6) of the Civil Code states that "if the obligation relates to goods of a kind, the debtor cannot rely on the forcible impossibility of execution." The solution provided by the Civil Code is logical and also applicable in the case of the debtor in a bank credit contract.

At first glance, the inclusion of risk in the cost of financing and all the complicated calculations made by the bank to protect itself against risk appear to be abnormal, as it appears that it would never be the culpable party for not fulfilling the obligation and, however, the risk is borne by the borrower, which is also the owner of the credit amount. However, the bank's highest risk is not related to the derivative object of the contract (the amount borrowed), but to the lending itself, which obviously implies the probability that the borrower will not repay the loan, whether he does not want or cannot do it or if the amount borrowed in foreign currency is devalued or not. Also, the bank's risk is not related to the asset bought by the client with the borrowed money simply because it is not owned by the bank (Săuleanu, 2017).

To a greater or lesser extent, the debtor's future income is transferred to the lender. Therefore, the client's future income is the key element of the lending decision. The value and quality of real guaranty come as a subsidiary to facilitate credit as an accessory. At the time of the credit application, the debtor's main problem is to inform on the product and the terms of the loan because it will

affect its expenses for a long period of time. After the credit is given, the debtor's risk of mitigating or losing the expected income is a personal one, but at the level of the credit relationship, this risk affects mainly the bank, because it will attract the non-reimbursement of money, and the bank's profit is a projection in the future. It therefore follows that the preference for time between consumption and saving creates immediate benefits to the debtor, because, rather than postponing the purchase of the good, he delays the payment while he uses it. The risk of non-payment is the main risk of the funding mechanism and it is only the risk of the creditor. It consists in the probability that the debtor will not want or be unable to fulfill his contractual obligations in part or in full. The state of non-reimbursement is a manifestation of credit risk and occurs when according to art. 178 of the EU Regulation no. 575/2013: (a) there is a late payment of the debtor for more than 90 days for any of his significant obligations towards the credit institution and / or (b) the credit institution shall assess as unlikely the full payment of the liabilities assumed by the debtor without the guarantee, irrespective of the number of days of arrears (Piedelièvre, 2009).

The evolution of the volume and the rate of non-performing loans is primarily a consequence of the dynamics of the default rates (and, implicitly, of the economic framework), depending on the speed of recovery of the value of receivables in court, the sale of bad loans, and the dynamics of lending. In the case of exposures to non-financial corporations, the volume of non-performing loans is influenced by the length of the insolvency process. At European level, the range varies between several months and over four years, and the higher recovery rate is associated with a shorter duration of recovery processes. In Romania, the length of the insolvency process - 3.3 years (generally completed by liquidation of the entity) - generates a recovery rate significantly lower than in the EU (34.4% in Romania, compared with 65% average in the European Union). The riskiest portfolio is the one guaranteed by commercial real estate: the rate of specific non-performing loans is rising (21.4% in January 2017, compared to 20.4% in September 2016), and the contribution to total non-performance is 38%. The population seems less risky in terms of the lowest rate of non-performance (7.4%) (Nicolaescu, 2017).

The bank and the customer determine the amount of the credit based on the customer's income level. The bank knows the expectations about the level of income over the contractual period, but not the risk associated with not realizing the income, being possible only to appreciate this risk. With regard to interest rate risk and currency risk, these are risks from both sides. Interest rate risk affects both national currency and foreign currency credits (Bercea, 2017). The fixed-rate borrower is satisfied as long as market interest rates are not declining, because if this happens, it means he pays more for the credit than the market price. The variable rate borrower is satisfied as long as the interest does not increase. Instead, the creditor who has granted fixed interest credit is satisfied as

long as market interest rates do not increase, because that would mean that he could have provided the bank product at a better price for him, and if the loan is with variable interest rate, he is satisfied as long as the interest rate does not decrease. As far as currency risk is concerned, the following specifications are also important: those of the Constitutional Court of Romania (Decision No. 62/2017 on the provisions of the Law on Government Emergency Ordinance No. 50/2010), "the contractual clause stipulating that the repayment of the loan is to be made in the currency in which the credit was contracted even under the conditions of appreciation / depreciation of this currency compared to the national currency, is a transposition of the law in the contractual field, i.e. the principle of monetary nominalism, no normative act does not interfere with the granting and reimbursement of credits in foreign currency. In such a situation, both parties take the risk that during the performance of the contract the amount repaid by the borrower will be less or more at the time of the refund than at the time of the grant, compared to another currency considered standard or, more objectively, in relation to gold" (paragraph 38).

Also, in the case of mortgage credit, banks have some additional risks, namely: default risk, liquidity risk and sovereign risk (Nicolaescu, 2017).

The liquidity risk is derived from the fact that the bank usually lends over very long maturities (20-30 years) from short- and short-term resources (1-2 years). Sovereign risk is related to the characteristics of the banking system that is supported by external funding from parent-institutions. International capital transfers are exposed to this specific risk only from the perspective of the lender. Credit risk is also the result of information asymmetry and of adverse selection and moral hazard selection processes. Information asymmetry is a situation that occurs when insufficient knowledge of one party about the other party involved in the transaction makes it impossible to make a correct decision about the transaction. Asymmetry of information generates two problems: adverse selection and moral hazard. The negative selection takes place before the transaction. The adverse selection on the lending market occurs when the bank pays credit to high-risk borrowers who are most likely not to repay the amount - for example, the property under warranty has a different real-estate destination than that of housing and this was hidden from the creditor, or the debtor knows that there will be significant changes in monthly earnings (for example, he is going to lose his job) and obviously conceals this fact to the creditor. Taking into account this risk, let us say, by misdirection of funds to debtors who will not pay the loan, the bank may refuse to grant credit to any customer, even if he is willing to pay a higher interest rate, or to restrict the size of the loan to a value less than that desired by the customer.

Moral hazard occurs after the credit is given, and it is likely that once the credit is received, the client tends to take unjustified risks based on the costs incurred by a third party who takes up all or part of the risk. One way to reduce

information asymmetry and moral hazard issues is to establish as clearly as possible the parameters of conduct through contractual clauses - for example, the debtor's obligation to use the credit as specified in the contract; the obligation to inform the bank about the debtor's economic and financial situation; the debtor's obligation not to alienate, not to bribe, rent, dismantle, assemble or demolish the collateral property which constitutes a guarantee to the bank; the obligation of the debtor not to refuse to repay the loan installments or to pay the other fees for reasons related to the execution of the financed construction works; the bank's right to automatically debit the borrower's current account with the value of the commissioned commissions; cases of suspension of execution of the bank's obligations. In some contracts there is a clause stipulating that the bank reserves the right to suspend the use of credit if the debtors' accounts are subject to appeals or other legal prohibitions. Another tool to reduce the information asymmetry is to collect credit data through credit bureau entities that have information on the use of credits and the discipline of payment for certain categories of borrowers. Based on these data, forecasts of future payment performance that may be available to any creditor can be established (Bercea, 2017).

Banking risk management activity, especially the risk of default, is extremely important, being regulated both at national and European Union level.

Thus, the Regulation of the National Bank of Romania no. 5/2013 on prudential requirements for credit institutions defines "credit risk" as the present or future risk of adverse profits and capital due to a default by the debtor of his contractual obligations or his failure to meet the established ones. The Regulation determines the fact that credit institutions must have a risk management framework that must include policies, procedures, limits and controls to ensure the identification, measurement or evaluation, monitoring, mitigation and reporting of risks related to its line-of-business activity and at the overall level of the credit institution.

Also, Regulation (EU) 575/2013 on prudential requirements for credit institutions and investment firms and the amending of the E.U. Regulation 648/2012 also sets out a series of uniform rules regarding the general prudential requirements that credit institutions must meet in order to manage credit risk. In this respect, it is relevant for the creditor to correctly determine the risk weight at the time the credit is granted, and the debtor's actual ability to repay the debt.

In applying these principles, starting with 2003, there were regulations of the National Bank regarding the conditions for granting, guaranteeing and developing consumer credits. The first one, Norm no. 15/2003 on limitation of credit risk on consumer credit, provided that the leverage ratio cannot exceed 30% of the net income of the applicant and his / her family. Granting consensual credits for purposes other than the purchase of goods was conditional on the actual presentation by the borrower of collateral and / or the presentation of personal guarantees by third parties at the level of the requested loan.

Subsequently, this regulation was repealed by the NBR Norm no. 10/2005 on the limitation of credit risk on loans to individuals, the debt ratio increasing to 40% of borrowers' net income. The norm established that the value of a credit for real estate investment could not exceed 75% of the value of the real estate for which the loan was requested and / or of the estimated value. The granting of loans for real estate investment was conditional upon the applicant presenting real and / or personal guarantees, and the value of the collateral could not be less than 133% of the amount of the loan. And Norm no. 10/2005 was, in turn, repealed and replaced by the NBR Regulation no. 3/2007 on limiting credit risk - on loans to individuals, which no longer provides for a maximum degree of indebtedness common to all banks, but it is established that banks will internally regulate this issue, and that these regulations will be approved by The National Bank of Romania. Subsequent regulation, namely the NBR Regulation no. 24/2011 on loans to individuals, provided that when granting consumer credit denominated in foreign currency, the applicant must have real and / or personal guarantees at a minimum 133% of the amount of the loan. It was also established that the value of a credit for real estate investment could not exceed 85% of the value of the mortgage in the case of loans granted in lei and 80% of the value of the mortgage collateral in the case of loans denominated in a foreign currency, if the borrower obtains eligible denominated incomes or indexed to the credit currency. The amount of a credit for real estate investment granted to a debtor who does not acquire eligible denominations or indexed to the currency of credit may not exceed 75% of the value of the mortgage in the case of euro-denominated loans or indexed at the euro rate and 60% in the case of loans denominated in other foreign currency or indexed to other foreign currencies.

The most recent regulation of the National Bank of Romania, currently in force, is the NBR Regulation no. 17/2012 on certain credit conditions, which maintains the provisions of the previous Regulation in what concerns the conditions for granting and guaranteeing loans.

2. RISK REASSESSMENT THROUGH LAW NO. 77/2016

Adoption by the Romanian Parliament of Law no. 77/2016 on the payment of immovable property to settle liabilities assumed by credit brings some changes in the application of the theory of bank loan contracts through the re-qualification, reconsideration and redefinition of the notion of risk encountered under these contracts. Thus, the initiators of the law, as well as supporters, have affirmed that this law seeks justice, that it is a law of fairness and that it strikes a balance between the risks shared by the parties. It has been argued that the credit risks are entirely assumed by consumers and that such a "risk-sharing" is not fair. Many allegations have also been made that credit institutions (banks) have abusive practices (abusive clauses) and that it is therefore necessary for the legislature to intervene in order to "bring" these issues to normality. In this

sense, the Explanatory Memorandum of the law states that: "The present bill aims to (...) share, as fair as possible, the risks of devaluing the good between the lender and the debtor. " It is also stated that: "The situation is unfair as the credit institution or the non-banking financial institution has, in principle, granted a credit, provided that the value of the property was determined by the creditors' evaluators and that "Restoring contractual equilibrium means that in the event of a" contract crisis "the parties share the risk." However, the giving in payment law has only one article in which it talks about risks. This is art. 11, which is worded as follows: "In order to balance the risks arising from the credit agreement as well as from the devaluation of immovable property, this Law shall be applied both to credit agreements in progress at the time of its entry into force and to contracts concluded after that date ". We can ask whether the legal risk of the contract was considered by the legislator when regulating this principle in art. 11. The answer can be difficult because the explanatory memorandum makes it necessary to intervene in the "context in which the debtors (...) do not have the necessary means to pay the debts". On the other hand, the Explanatory Memorandum also states that the principle of unlimited liability of the debtor must be or is "overthrown" by "the real situation of over-indebtedness of the debtor, which being in the impossibility of payment (as defined by art. 1.634 C. civ.) must be released from debt". Thus, it seems that - in the view of the initiators of the law - the debtor's over-indebtedness situation is equivalent to the impossibility of payment, as mentioned in art. 1.634 in the civil Code. It was not observed and, however, nothing was mentioned about paragraph (6) of art. 1.634, which has express provisions regarding the performance of obligations related to goods of a kind, we have now shown in the previous section. We may have to deal with a confusion in the Explanatory Memorandum in the sense that the risk envisaged by the initiators did not concern the aspect of the impossibility of execution (which concerns the "physical" aspect of the object of the contract, namely the disappearance / deterioration of the object which is the object of the contract, but the risk generated by over-indebtedness of the debtor. The loss of the property implies, however, its actual disappearance, a situation which leads to the debtor being released only when the obligation has as its object a determined individual asset, and not if the object of the obligation consists of goods of a kind, since these goods can be replaced by others of the same nature (Chiorean, 2017). As we have shown before, for a gender-related obligation not to be executed, all things of the same nature would have to disappear.

What seems to be taken into consideration by the giving in Payment Law, that is the lack of material possibilities, cannot be a cause that exonerates the debtor from the obligations assumed under the credit agreement. Accepting such an opinion would be equivalent to placing a contract on a purely potestative condition, that is to say, the obligations assumed in the contract would be conditioned by the borrower's ability to execute it, a condition which would

depend only on his will - we recall that it is forbidden to stipulate a purely potestative condition (Article 1.403 of the Civil Code). Equally we observe that the Law does not include among the necessary conditions for its application (Article 4) any reference or condition that "verifies" the existence of "over-indebtedness".

So, although it seems that the purpose of the Law was to support over-indebted borrowers, the Law does not "treat" this issue and leaves open the "use" of the Law not only by over-indebted borrowers, but also by debtors who, although not in the case of over-indebtedness, choose (for various reasons) to put off their obligations to the credit institution.

Furthermore, we must note that over-indebted borrowers have, in our current legal system, legal institutions that can assist them in situations such as those contemplated by Law no. 77/2016. The situation of overly onerous obligations can be solved by the institution of imprevision, also by Law no. 151/2015 on the Insolvency Procedure for Individuals (which came into force in the meantime) establishes mechanisms that support the individuals who are no longer able to cope with the assumed obligations. Without going into the analysis of the aforementioned institutions (unpredictability and personal bankruptcy respectively), we can assume that the legislator wished to provide an easier way for debtors in difficulty, but we appreciate that the insertion in the text of the law of a condition meant to verify the situation of the debtor's difficulty (over-indebtedness) should have been achieved, so that the text of the law would (more) be consistent with its declared purpose (Zamșa, 2017).

Summing up, the risks derived from the credit contract likely to be considered by the legislator are the risk of diminishing or losing the borrower's income (liquidity and solvency risk), the borrower's risk, the currency risk, if we are talking about a currency credit (i.e. the risk of devaluation of the domestic currency against the currency of credit) and interest rate risk (i.e. the risk of interest rate increase if it is variable - linked to an index), these events being likely to lead to a situation of over-indebtedness and / or impossibility of payment, as mentioned in the Explanatory Memorandum. Currency risk and interest rate risk are classified as market risks. However, whichever of the aforementioned events ultimately results in the credit institution being the one to bear the risk. If the debtor is contractually obliged to repay the borrowed amounts (plus interest if he/she cannot make the payments according to the contract, the bank is the one who bears the risk, as the bank will not receive the advanced amounts; in this context, it should also be considered that the banks are financial intermediaries. Banks are making deposits and offering loans. Thus, in turn, banks have obligations to be respected towards their depositors. Moreover, currency and interest rate risk are related to developments that can also produce benefits. Thus, if for the currency in which the credit was granted, there is a devaluation (in relation to the national currency), then the borrower

will pay the bank lower amounts (expressed in national currency), so he/she will have a relief of the burden. The same effect will also occur in the event of a decrease in interest (if this is variable). Therefore, borrowers may have both a risk and a benefit from the evolution of these indicators (the exchange rate and the interest rate) and it is neither logical nor equitable that, when the risk arises, to be borne by the lender (as required by the Giving in Payment Law), and if a benefit arises, to be in the benefit of the debtor (Stoica, 2016).

The result of the constitutionality control of Law no. 77/2016, by the Constitutional Court Decision no. 623/2016 significantly changed the contractual mechanism by recognizing the mechanism of the law as a mechanism subordinated to the theory of imprevision, thus generating a new risk for the bank (Stoica, 2017). Following Decision no. 623/2016, we found out that, in addition to the inherent risk, the credit agreement concluded under the old Civil Code also implies an over-added risk, "which could not be the object of a prediction by any of them, a risk passing beyond by the power of provision of the contracting parties, and which is related to the intervention of elements that could not be taken into account at a time" (paragraph 96). Thus, in the event of a misunderstanding between the parties, the assessment of the existence of the unexpected situation and of its effects on the performance of the contract and good faith in the performance of the contract will be made by the court by widening the role of the judge in the contract but "legal security will not be endangered" (paragraphs 99 and 100).

In the press release dated October 25, 2016, by which the Constitutional Court made its verdict, it was stated that the phrase "as well as from the devaluation of immovable property" in art. 11, first sentence of Law no. 77/2016 on the giving in payment of immovable property in order to settle its obligations under loans is unconstitutional. The Court added that, when declaring that phrase unconstitutional, it took into account the fact that the devaluation of immovable property is not incident in relation to the object of credit agreements. Then in the text of Decision no. 623/2016, as published in the Official Monitor no. 53 of January 18, 2017, the Constitutional Court resumes the idea and reaffirms the unconstitutionality of the phrase "as well as the devaluation of immovable property", since the object of the credit agreement is money and not immovable assets, thus affecting art. 44 of the Romanian Constitution. The Court adds that the devaluation of the guarantee is unrelated to the execution of the credit agreement. Further, however, the Constitutional Court departs from these ideas, indicating that that criterion could be used in conjunction with the principle of equity as part of the theory of imprevision, and the courts could assess the imbalance in benefits resulting from the credit agreement and by resorting to that criterion when the credit agreement was concluded for the purchase of a building. The idea is criticized in that when the devaluation of the funded real estate occurs, the situation of the debtor is in no way different from the situation

in which the loan amounts have financed other needs (e.g. the purchase of movable assets). In both situations, the value of a debtor's good may decrease, but this is not imputable to the creditor (Popa, 2017). In paragraph 95, the Court, referring to the possibility of applying the unpredictability under the old Civil Code, states that "both the doctrine and the practice have recognized the possibility of applying the theory of imprecision in the event that an exceptional and extraordinary event of the parties could not be reasonably foreseen at the date of the conclusion of the contract, would make the debtor's obligation excessively onerous".

In paragraph 96, the Court explains that "unpredictability occurs when an exceptional and extraordinary event, which could not reasonably be foreseen at the time of the conclusion of the contract as to its scope and effects, has occurred in the execution of the contract, which renders the fulfillment of its obligations excessively onerous". Thus, in paragraph 98, it is stated that "the adaptation of the contract during its execution to the new reality is equivalent to the maintenance of its social utility, more precisely, allows the contract to be further enforced by rebalancing benefits". Also, in paragraph 102, the Constitutional Court of Appeal states that the legislator had in view the rebalancing of the benefits provided that, during the execution of the contract, there was an additional risk to the natural risk accompanying a credit agreement and where neither party is guilty of the occurrence of the event.

Consequently, on several occasions (paragraphs 95, 96, 98, 102), the Constitutional Court of Appeal stated that unpredictability aims at re-establishing the contract on new, equitable basis when the performance of one party becomes too onerous (excessively onerous). Improvisation has the role of rebalancing benefits. So, in the court's view, unpredictability concerns the onerousness of "benefits," not the relationship between the performance and the benefit brought to the party. Rebalancing benefits cannot be understood differently from one another, and not as a rebalancing of the benefit in relation to the benefit obtained. Otherwise, we would get to a situation where the contract should be "rebalanced" only because one party acted without the necessary diligence and made an unprofitable investment. When the funded good is being devalued, the debtor's performance does not become more onerous.

Through this approach, in fact, the Constitutional Court of Romania seems to agree with the initiators of the law and the law forum, who wanted the risks deriving from the "investment" activity of the borrower to be taken over by the credit institutions. While claiming that the execution of contracts should be governed by the principles of equity and good faith, there is an unexpected "sharing" of risks.

3. RELEVANT JURISPRUDENCE OF THE CJEU IN THE MATTER

In the European Union, following the appearance of Council Directive 93/13 / EEC of 5 April 1993, the Court of Justice of the European Union has ruled on several cases in which it can be inferred that, in the Court's view, consumer rights (and their protection) should be viewed in absolute terms or whether a balance between consumer protection (consumer interest) and other interests is imposed (Paisant, 1993).

A first relevant case for the issues dealt with in this article could be C-453/10, Jana Pereničová and Vladislav Perenič against SOS finance spol. s.r.o. in which the Court was seized with a reference for a preliminary ruling in a dispute between two Slovak nationals and a non-banking financial institution. By their action, the claimants in the main proceedings requested the referring court to find that the credit agreement they had concluded with a non-bank financial institution was null and void. The applicants argued that the annual percentage rate of charge was not correctly reflected in the contract. The court pointed out that the declaration of nullity of the entire contract, made for the reason of the abusive nature of several clauses, would be more advantageous for the plaintiffs than the maintenance of the non-abusive clauses in the contract.

The referring court (the Presov Tribunal) requested that the question whether Art. 6 para (1) of Directive 93/13 / EEC must be interpreted as allowing the national courts to decide, in the case in which it finds that unfair terms are in a contract between a trader and a consumer, that the contract does not create obligations for the consumer on the reason it is thus more advantageous for the consumer.

The Advocate General pointed out that the objective pursued by the European Union legislature in Directive 93/13/EEC is to restore the balance between the parties, maintaining in principle the validity of the entire contract, and not to cancel all contracts containing unfair terms.

The Court held that Art. 6 para (1) of Council Directive 93/13 / EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted that when assessing whether a contract concluded with a consumer by a trader and containing one or more many abusive clauses may continue to exist without the above clauses, the court seized may not rely only on the possible advantage for one of the parties (in this case the consumer) of canceling the contract in its entirety (even though the Member States may provide, in compliance with the Union law that a contract with a consumer and containing abusive clauses is entirely null and void, thereby ensuring better consumer protection).

Other relevant cases, such as Case C-154/15, C-307/15 AND C-308/15, originated in Spain and were determined by the following practice of Spanish banks: "in real estate credit agreements there were clauses stating that if the interest rate varies by less than a certain level stipulated in the contract, interest will be applied equal to the threshold (threshold) defined in the contract, without lowering the threshold below the threshold. From an economic point of view, the

justification of these provisions is related to the need to maintain a minimum level of return on these loans. Several individuals considered that the threshold clauses introduced in credit agreements with consumers were abusive and therefore could not create obligations for consumers. Thus, the Supreme Court of Spain analyzed, in the context of a collective action brought by a consumer association against several banking institutions, the abusive nature of the threshold clauses. The Spanish court found that, since they could not be separated from the price or the consideration, the threshold clauses were the main object of the contract, so that it was not possible, in principle, to control the abusive nature of their content. However, since the Court had previously allowed judicial review of the clauses defining the main object of the contract in order to provide the consumer with a higher level of protection, the Supreme Court considered that it could analyze the possible misuse of the 'threshold'. Although the court held that the "threshold" clauses were lawful in the sense that they complied with the legal requirements on transparency, it considered that they did not allow the consumer to easily know the burden imposed on him. Therefore, he categorized the threshold clauses as abusive, found the nullity and because the court considered that it ex-ante applied a reinforced control of the transparency of the disputed clauses at the request of the Public Ministry, it limited the temporal effects of its judgment. Thus, retroactivity could be limited on the basis of the principles of legal certainty, fairness and prohibition of unjust enrichment and found that the declaration of invalidity did not affect payments made before the date of the judgment of 9 May 2013. Subsequently, the Commercial Tribunal of Granada and the Provincial Court of Alicante were asked to pronounce on the abusive character of the threshold clauses, soliciting the Court of Justice of the European Union to determine whether the limitation of the effects of a nullity decision from the date of the judgment of the Supreme Court is compatible with the Unfair Terms Directive (Directive 93/13 / EEC), since, under that directive, such clauses do not create obligations for consumers.

In his conclusions of 13 July 2016 in Joined Cases C-154/15, C-307/15 and C-308/15 [Francisco Gutierrez Naranjo v Cajasur Banco SA (C-154/15), Ana Maria Palacios Marttnez v. Banco Bilbao Vizcaya Argentaria SA (C-307/15) and Banco Popular Espanol SA v Emilio Irles Lâpez, Teresa Torres Andreu (C-308/15)], Advocate General Paolo Mengozzi pointed out that the Directive does not lay down the conditions under which a national court is entitled to limit the effects of decisions to establish the unfairness of a contractual term. Consequently, it comes to the domestic legal order of the Member States to lay down those conditions, subject to compliance with the principles of equivalence and effectiveness of the European Union law. In what concerns the principle of effectiveness, the Advocate General considers that, since it constitutes a sanction having a dissuasive effect on sellers or suppliers, the prohibition on the use of threshold clauses from 9 May 2013 and the obligation to repay unjustified

amounts from that date contribute to achieving the objectives pursued by the Directive. In addition, the Advocate General states that, at the time of the judgment on the temporal effects of his judgment, a national court may put on balance consumer protection and the macroeconomic implications of a decision. Thus, the macroeconomic implications may justify the temporal limitation of the effects of the nullity of an abusive clause without breaking the balance in the relationship between the consumer and the trader.

Subsequently, in December 2016, the European Court of Justice ruled that a national case law limiting the effects of invalidity over time would only allow limited consumer protection, this being incomplete and insufficient, neither adequate nor sufficient to prevent the use of abusive clauses. Analyzing what has been decided by the Court of Justice of the European Union, we can see a concern on the existence of a contractual balance, namely against the abuse of power by vendors, suppliers (by including abusive clauses and / or excluding essential rights). Equally, the Court has stated that a balance must be reached, and this does not mean considering only the interests of consumers. The appreciation should not be made considering only the interests of one party. In particular, the decision of the Spanish Supreme Court also shows that in certain situations law institutions with a certain mode of functioning can be "censored" in order to achieve a real balance and to avoid macroeconomic side-slip.

The more nuanced position of other courts also draws attention to the uncertainty with which Law no. 77/2016 and the Constitutional Court Decision leave us until the establishment of a unified national jurisprudence in the matter (Poillot, 2006).

4. CONCLUSIONS

Undoubtedly, in the light of the above, the purpose of the credit agreement is not to associate itself in joint projects between the lender and the borrower, but to transfer funds from the lender to the one who wants it. The borrower is the one who prefers to benefit now and not later, and the lender now transfers funds to those who prefer not to postpone consumption. It may result that this preference creates immediate benefits to the debtor, because, rather than postponing the purchase of the good, it delays the payment while it uses it. For the lender, the benefits are uncertain because it is based on a promised, not repaid reimbursement, and, however, limited to the amount of the loan. If the borrower's income increases during the lending period, he will retain the surplus between the debt and the income.

As we have shown, the risks of the credit agreement are neither perfectly transferable between the parties nor equal. The problem of risk must be primarily accepted by the debtor. Banks do it in the light of the regulatory framework that compels them to take risks into account and, consequently, to have prudent conduct. Of course, the crisis has revealed some vices of the prudential

framework not only in Romania but globally. Regulatory efforts in recent years are obvious and continue, but what is most difficult to regulate is debtor behavior and effective understanding, in terms of assuming contractual terms.

Also, on the grounds of Decision no. 623/2016 it follows that the application of the provisions of the giving in payment Law, in the cases in which the courts are invested with the analysis of credit agreements, will also be made in the light of the constitutional court's statutes. In particular, the giving in payment Law will be applied rather only as a procedural law, and because unpredictability cannot operate ope legis, the courts will have to administer all the necessary evidence to establish the existence of substantive, objective and subjective conditions, of the imprevision stipulated by art. 1,271 Civil Code in which unpredictability is expressly regulated. It remains to be seen, however, how practitioners and theorists of law will find the most appropriate and righteous variants of harmonizing the mechanism of unpredictability with the specificity of forced payment in accordance with Law no. 77/2016, as well as the general giving in payment rules provided by the Civil Code.

References

1) Bercea, L. (2017). Riscul valutar, impreviziunea şi conversia creditelor în valută. *Revista Română de Drept Privat*, 1/2017, pp. 24-52.
2) Chiorean, I.C. (2017). Condiţii prevăzute de Legea nr. 77/2016 pentru naşterea dreptului la stingerea creanţelor bancare prin dare în plată. *Revista Română de Drept Privat*, 1/2017, pp. 65-78.
3) Nicolaescu, D. (2017). Legea dării în plată: împarte echitabil riscurile sau afirmă supremaţia dreptului consumatorului? *Revista Română de Drept Privat*, 1/2017, pp. 88-104.
4) Paisant, G. (1993). *Essai sur la notion de consommateur en droit positif.* JCP ed. G.
5) Piedelièvre, S. (2008). *Droit de la Consommation.* Paris: Economica.
6) Piedelièvre, S. (2009). *Droit de l'Exécution.* Paris: Thémis, Droit, PUF.
7) Poillot, E. (2006). *Droit européen de la consommation et uniformisation du droit des contrats.* Paris: L.G.D.J.
8) Popa, I.-F. (2017). Impreviziunea si creditele oferite consumatorilor. Constituie darea în plată şi conversia valutară remedii ale impreviziunii? *Revista Română de Drept Privat*, 1/2017, pp. 104-129.
9) Săuleanu, L. (2017). Riscul în contractele de credit, cu privire specială asupra risului valutar. *Revista Română de Drept Privat*, 2/2017, pp. 144-153.
10) Silberstein, I. (2017). Creditul Bancar – activitate esenţială a instituţiilor de credit. *Revista Română de Drept Privat*, 2/2017, pp. 153-160.
11) Stoica, V. (2016). *Natura juridică a dreptului de a stinge creanţa bancară ipotecară şi datoria corelativă, conform Legii nr. 77/2016, Legea dării în plată. Argumente şi soluţii.* Bucureşti: Hamangiu.
12) Stoica, V. (2017). O lectură constituţională, dincoace şi dincolo de legea dării în plată. *Revista Română de Drept Privat*, 1/2017, pp. 185-214.

13) Zamşa, C. (2017). Privire comparativă asupra impreviziunii în sistemul vechiului şi actualului Cod civil cu trimitere la Decizia Curţii Constituţionale nr. 623/2016. *Revista Română de Drept Privat*, 1/2017, pp. 220-231.

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BITCOIN AND THE ISSUE OF ITS REGULATION

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Abstract
The appearance of Bitcoin has brought an alternative to traditional money. However, beside its advantages consisting in secured, cheaper and faster transactions, borderless use, anonymity of the participants and lack of inflation, which makes it attractive for many people, Bitcoin also generates significant threats not only towards banks and economy, in general, but also to the society. Its private nature, beyond the supervision of any authority and especially the anonymity ensured for the participants in transactions with Bitcoin opens possibilities of using it in money laundering and terrorism activities, but also for speculative attacks on traditional currencies. Moreover, intermediating the sales of goods and services it interferes with traditional payment systems and may affect the monetary policies of governments from all over the world, including European Union countries. Therefore, debating on the issue of finding ways to regulate the use of Bitcoin in order to prevent such threats become justified and led us to the conclusion that beyond the need of regulations to be created by each country, because of its borderless use, there needed also regulatory measures to be taken on global scale by institutions like IMF or European Commission. Moreover, because of its dual nature, for regulating Bitcoin there is a need to combine the legislation applicable to traditional currencies with the one applicable to financial assets.
Keywords: *Bitcoin; currency; financial asset; regulations; IMF.*
JEL Classification: E42, K24, O33

1. INTRODUCTION

On the background of new technologies development, important changes in the area of payment systems are brought by the creation of new electronic instruments, out of which Bitcoin appears to be one of the most intriguing ones. Because of its private and decentralized issuance and of its use within a peer-to-peer electronic exchange system, but also of its exceptional features, Bitcoin generates many disputes regarding its nature being mostly considered either as a type of currency or as a financial asset. Bitcoin's characteristics offer significant advantages, but open also dangerous possibilities for affecting the economy and the society and lead to another debate on the issue of regulating it. Therefore, this paper is meant to analyse the points of view regarding both Bitcoin nature and also the reasons and the possibilities of regulating it.

2. BITCOIN – FROM CREATION TO NOWADAYS

Bitcoin is considered to be the most successful virtual currency (ECB, 2012). According to the limited existing literature, Bitcoin was launched in January 2009. Its creation remains however still obscure while literature considers as it's inventor either an individual computer programmer (Elwell, Murphy and Seitzinger, 2015) or an anonymous group of people (Turpin, 2014), who published, under the pseudonym of Satoshi Nakamoto, a paper (Nakamoto, 2008) proposing a new peer-to-peer electronic cash system named Bitcoin.

According to Maurer, Nelms and Swartz (2013) Bitcoin's creation may be perceived as a consequence of people dissatisfaction regarding both the way that governments handled the global financial crisis of 2007–2008 and, especially the way banks acted as intermediaries within the payments relationships of their customers. In this regard, the idea from which the inventors of Bitcoin have started was to create an electronic instrument, similar to fiat currencies, to be used in peer to peer transactions not requiring intermediaries such as Mastercard or Paypal.

This new intended digital currency was also meant to operate completely private, outside the control of any central bank or government, in order to avoid any manipulation for political and economic gains as they were observed in the case of fiat currencies (Staiger and Sykes, 2010) and limiting in this way the possibilities of creating inflation. Therefore, following the latter idea, the inventors of Bitcoin have set from start a fixed limit of 21 million Bitcoin for the supply of this currency and designed mechanisms for getting and using Bitcoin in order to ensure a gradual increase of the volume of this currency.

Technically, in order to get and to use Bitcoin, someone has to download and operate a specific free and open source software for peer-to-peer transactions that was first developed by the inventors of this system and that operates on the principles of cryptography, both regarding its issuance and the validation of transactions served by it. In this regard, using encryption techniques the system attributes unique identities for each of the users, on one hand, and for each unit of Bitcoin, on the other hand. Therefore, due to the novelty brought by this cryptographic approach and to its extended use, Bitcoin was and still is considered to be the most representative cryptocurrency.

As digital currency, Bitcoin consists in a string of zeros and ones stored in an encrypted file of its owner, called "wallet" (Velde, 2013). It can be used by the owner for transactions within the Bitcoin network by using a pair of digital signatures representing a public key and a private one (ECB, 2012). All Bitcoins are also registered into a ledger which is public to all participants in Bitcoin network, containing their addresses (encoded names), their balance and also the chain of digital signatures added by all previous owners of Bitcoins within the previous transactions. However, even this file contains the information regarding all the history of transactions made with any specific Bitcoin, which is publicly available, it does not offer personal data regarding the parties of any of these

transactions due to the fact that the accounts of the participants are encoded. Moreover, the Bitcoin system was designed aiming to ensure that the owner a Bitcoin to be the only person able to spent it.

On the other hand, even if in time there were several attempts to give physical form to Bitcoins, out of which one well-known is that of Mike Caldwell, who designed a set of collectible coins containing Bitcoin keys, in the end, mainly due due to the legal bindings regarding the issuance of physical money, Bitcoin remained to be used as a digital currency.

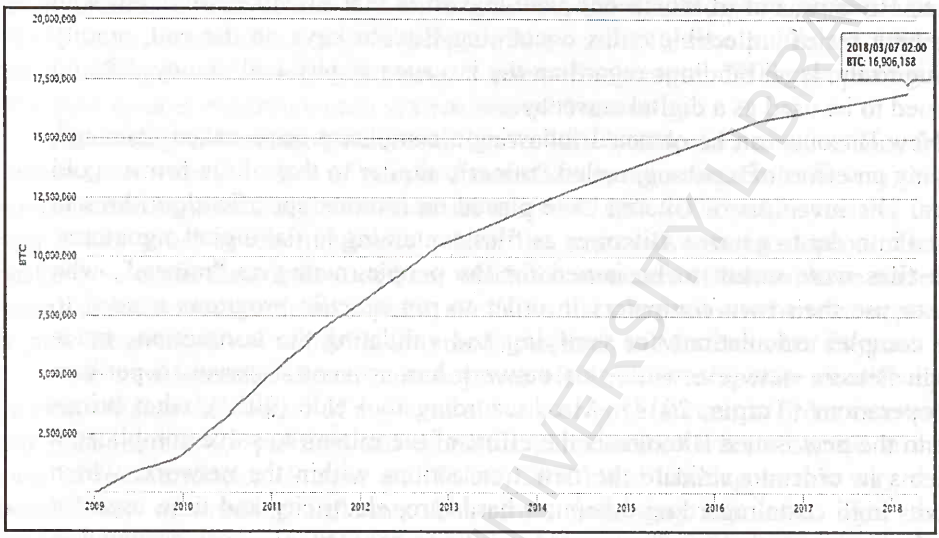
New Bitcoins can be obtained following a complex process called "mining", implying an effort of a person, called "miner", similar to that of the former gold miners. The inventors of Bitcoin have placed on Internet specific algorithms to be used in order to get new Bitcoins, as files containing initial digital signatures. These files were meant to be issued for the people, acting as "miners", who agree to use their own computers in order to run specific programs needed to make complex calculations for verifying and validating the transactions made through Bitcoin network, while this network has no central server to perform such operations (Turpin, 2014). Also, according to Velde (2013), what brings value to the new issued Bitcoins is the effort of the miners to solve complicated problems in order to validate the new transactions within the network, which involves high costs regarding computer hardware, electricity and time used for doing it. However, this mechanism for supplying new Bitcoins was designed to adapt itself in order to control inflation, the issuance of new Bitcoins being reduced progressively and claiming increasing efforts from the miners as their number becomes higher. Thus, while miners were rewarded at first with 50 Bitcoin for succeeding in gathering together blocks of new transactions and verifying their validity, including the fact that the buyer owns the spent Bitcoins and transferred them to the seller, 4 years later the system rewarded miners only 25 Bitcoins for this task and it appears that the system is set to halve the reward after each approximately 4 years, now the reward being of 12.5 Bitcoins.

On the other hand, one can get existing Bitcoins either in exchange of goods or services sold within the network, or by purchasing them on the market against fiat currencies at the price determined by supply and demand. In this regard, the participants to the Bitcoin system involved in such transactions use pairs of digital signatures, consisting in a public key and a private one, all transactions being recorded into a public ledger, called "blockchain", accessible for any participant but not offering personal information about the parties involved in transactions.

Although the tasks performed by the miners are complex, due to the advanced computer hardware used for this, the validation of each transaction performed using Bitcoins lasts about 10 minutes and this explains that since the creation of the Bitcoin system in 2009, the number of Bitcoins on the market has

increased quite rapidly and, according to the official estimations, reached over 16.9 million in March 2018, as it can be seen in Figure 1.

Figure 1. The evolution of the total number of Bitcoins in circulation



Source: Blockchain Luxembourg S.A.R.L. (2018)

Even if such a rapid increase of the number of Bitcoins on the market seems to raise questions about the fact that the total limit of 21 million Bitcoins might be reached quite soon and this could become a problem regarding the supply of enough Bitcoins necessary for transactions (Rogojanu and Badea, 2014), there are also other point of view that do not share such concerns. Thus, other studies (Van Alstyne, 2014) consider that the problem of the 21 million limit for the issued Bitcoins can be overpassed because Bitcoin may be divided into fractions up to eight decimal places (ECB, 2012).

The unusual creation and operation of Bitcoin, through a completely decentralized and private system led to many controversial debates on its functioning and its implications, including on the possibility of considering it a currency and on the necessity of regulating it. However, such debates have stressed a lot of elements pleading on one hand in favor of the use of Bitcoin, but also weak points and threats coming from its use, on the other hand.

3. BITCOIN – A CURRENCY OR NOT?

One of the major similarities of Bitcoin with the fiat currencies, such as Swiss franc or British pound, is that all of them do not have any intrinsic value,

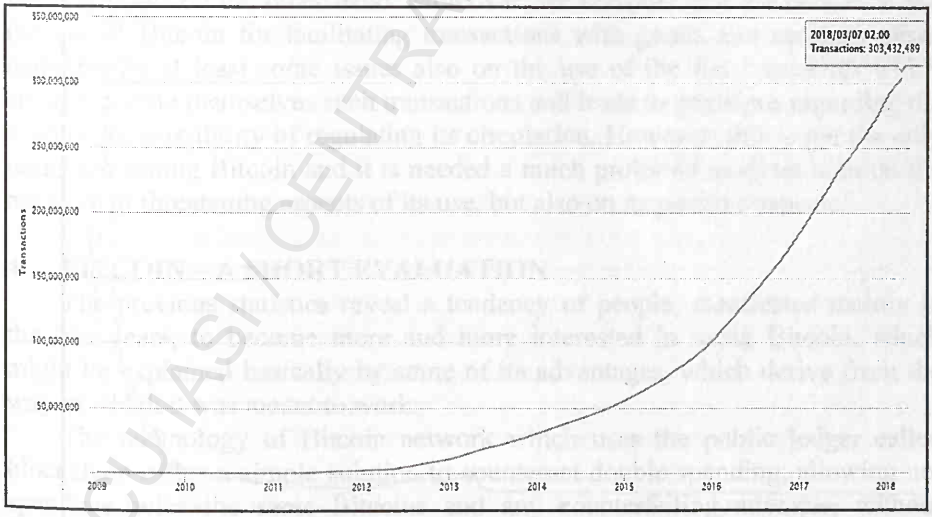
as is the case of the previous gold money or the case of the money that were convertible in gold.

Moreover, according to some opinions appears to have also similar or even superior (Plassaras, 2013) functions as any fiat currency and therefore many people consider that it is indeed a currency and should be approached in this manner under all its aspects, including its regulation, while there are also opponents to this idea that consider Bitcoin to be actually a financial asset.

Generally, it is acknowledged that a currency may be defined by the functions it needs to serve which consist first in its ability to be used for transactions as a medium of exchange, second in using it as a unit of account and third in its ability to store value. Therefore, in order to conclude whether Bitcoin can be perceived as a currency it has to be analyzed it it fulfils the previous requirements.

Bitcoin was created from start in order to serve as a medium for exchange, even if compared to the fiat currencies it was meant to be a private one. The fact that it acts as a medium of exchange cannot be denied, while it is accepted for the payment of goods and services by thousands of sellers almost all over the world, being especially used in electronic commerce but not only. In this regard, statistics show also that, even if between 2009 and 2012 people seemed to be reticent to using Bitcoin as a mean of payment, after 2012 the transactions made using Bitcoin increased almost exponentially, up to more than 300 million at the beginning of 2018, as the following figure shows it (Figure 2).

Figure 2. The evolution of the number of Bitcoin transactions



Source: Blockchain Luxembourg S.A.R.L. (2018)

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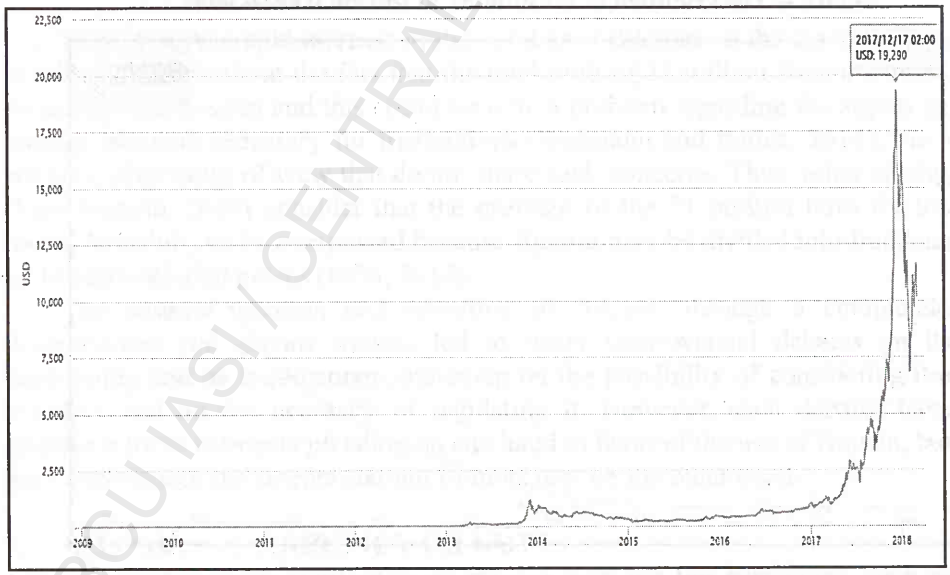
The figures regarding the number of transactions using Bitcoin may be considered small comparative to the ones for which are used other currencies, but we agree with Carick (2016) that this is not a criteria for excluding the idea that Bitcoin is a medium of exchange, while there is not set any minimum limit in this regard and there exist also other not contested currencies used in even fewer daily transactions than Bitcoin. At the same time, the rapid ascension of Bitcoin transactions during its short period of life creates premises for the proliferation of its use. On the other hand, while Bitcoin is not a legal tender, its use a medium of exchange depends on its acceptance by the businesses and this fact may affect its use as a currency (Kancs, Ciaian and Rajcaniova, 2015).

Regarding the fact that Bitcoin has the function of unit of account there are at least some strong reasons to accept this idea. As pointed before, Bitcoin is divisible into fractions up the eight decimal places making him suitable for valuing various goods and services. Also, the divisions of a Bitcoin can be put together and form again a single Bitcoin. Moreover, due to the fact that Bitcoins are created with equal value they are equivalent and also Bitcoins can be counted. Therefore, there is a solid ground to sustain that Bitcoin has function of unit of account. However, there are many contestants of this idea who sustain that, because of its volatility, especially as in the last period, (Figure 3), the ability of Bitcoin to value goods and services is questionable.

Figure 3. The evolution of Bitcoin value in US dollars



Source: Blockchain Luxembourg S.A.R.L. (2018)

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The fact that there are examples of many currencies that have passed through periods of severe volatility sometimes doubling or halving their values appears to give reason for not worrying about Bitcoin volatility. However, as Figure 3 shows, since 2016 the value of Bitcoin was subject of very abrupt rises and decreases, which are further higher than the variations of the usual fiat currencies even in times of crises or accelerated booms and somehow fuel the idea of the contestants of Bitcoin.

Bitcoin's volatility, especially the severe one registered in the last period, raises also questions regarding its ability of preserving the value and this remains the most controversial subject on the issue of considering Bitcoin a currency or not. According to Nakamoto (2008), one of the reasons for creating Bitcoin was to prevent the loss of value that might have been generated by government which implies that its value should have been preserved. Moreover, some studies (Velde, 2013; Glaser *et al.,* 2014) reveal that Bitcoin became attractive for many users more as a financial asset offering perspectives not only for preserving its value but also for increasing it. However, while fiat currencies are valued for their ability to remain stable when other assets show volatility, Bitcoin does not show such stability and this leads to serious concerns regarding its potential to preserve value. Therefore, in this context, Bitcoin appears for us to be more a financial asset than a currency.

The debate on the issue of considering Bitcoin a currency remains open in our opinion because of its specific features which on one hand make it very similar to a currency from some points of view, but also differentiate it from the fiat currencies on the other hand. Moreover, we consider that the existence and the use of Bitcoin for facilitating transactions with goods and services raises undoubtedly at least some issues also on the use of the fiat currencies which could facilitate themselves such transactions and leads to questions regarding the need or the possibility of regulating its circulation. However, this is not the only issue concerning Bitcoin and it is needed a much profound analysis both on the negative or threatening aspects of its use, but also on its positive aspects.

4. BITCOIN – A SHORT EVALUATION

The previous statistics reveal a tendency of people, manifested mainly in the late years, to become more and more interested in using Bitcoin, which might be explained basically by some of its advantages, which derive from the way in which it was meant to work.

The technology of Bitcoin network which uses the public ledger called blockchain offers a simple solution to counteract double-spending, allowing not spending twice the same Bitcoins and any counterfeiting attempts, without appealing to the confirmation of a third party (a bank or an authority) as in the case of using fiat money. As consequence, such feature of Bitcoin brings an

important advantage of speeding significantly the transactions and increasing money velocity.

The absence of any third party involvement in the transactions with Bitcoin brings also other advantages. This kind of transactions become less expensive because they eliminate the significant fees imposed otherwise to the merchants by the third parties for their intermediation. Moreover, as Elwell, Murphy and Seitzinger (2015) point out, while transactions in Bitcoin are non-reversible it is avoided the possibility of misuse of consumer charge-backs which are costly for the merchants. Based on these economies it also might be expected merchants to offer better prices for the consumers and to encourage them to make more Bitcoin payments.

Significant advantages of Bitcoin come also from its characteristic of being an international currency that can be used for transactions all over the world and therefore it avoids the exchange costs implied and also speeds up the transactions. Moreover, from the last point of view, the speed of transactions is increased also because of the electronic nature and use of Bitcoin.

At the same time, the way Bitcoin was conceived, implying processes that limit its supply and no control of the governments both regarding its supply but also the exchange regime, can also lead to advantages regarding avoiding inflation. This idea is also supported by Bitcoin's rarity and by the fact that Bitcoin's value is determined only by the market. In addition, while the technology of Bitcoin does not allow credit operations denominated in Bitcoin, this fact closes one channel which could fuel inflation phenomena.

On the other hand, the low transaction costs and the global use of Bitcoin may create opportunities for people in developing countries or with low financial resources to make transactions easier and cheaper than by using traditional banking systems (see also Turpin, 2014).

Moreover, Bitcoin offers a viable alternative for those who are interested in keeping their anonymity within their transactions.

As a virtual currency used globally, Bitcoin also opens important opportunities to changing the business and especially investment environment, by supporting the tendency of economic globalization and specifically the integration of the financial markets from all over the world.

Beside its advantages and the opportunities which it opens, Bitcoin use has however several weaknesses or disadvantages. One of them is that the participants in Bitcoin network need to make important investments in hardware equipment with high processing power, but also in advanced software, especially when participating in mining process. Moreover, using Bitcoin network requires specific knowledge on the new communication and information technologies.

Secondly, the lack of involvement of any monetary or governmental authority, combined with the little information available regarding who guarantees the good functioning of the network and the transactions intermediated on it, make

many people to have little trust in Bitcoin. At the same time, rumors that the network is used also for illegal transactions and the possibility that therefore the participants to this network might be at some point in time subject to legal actions from the authorities are also reasons for a low confidence of people in Bitcoin.

In addition, the high volatility of Bitcoin and also of other cryptocurrencies, proved during several periods and manifested on the background of the lack of regulations and of involvement of governments or central banks in supervising Bitcoin, has become a significant reason for which using or investing in Bitcoin is considered risky.

There are also several threats regarding Bitcoin existence, basically because it depends fundamentally of the trust of its users, and also several other important threats generated by its way of use. In this regard, its high volatility creates serious concerns for any of the existing users, confronted with the risk of losing significant money.

The electronic nature of Bitcoin makes it susceptible to another kind of threats, specific for all electronic instruments, consisting in the possibility of being subject of attacks coming from online hackers, aiming mostly to steel Bitcoins from their owners, but also to counterfeit some amounts of Bitcoin. Among other examples, some eloquent episodes in this regard are the incidents recorded by Mt. Gox which was for several years the most important Bitcoin currency exchange. First, in June 2011, a cyberattack on Mt. Gox (ECB, 2012) succeeded to compromise an account from which were stolen 400,000 Bitcoins valued at that time at 9 million USD, which were sold and led immediately also to a dropdown of Bitcoin's value from 17.5 USD to only 0.01 USD. Second, in February 2014, Mt. Gox filed for Bankruptcy in US and Japan, after declaring a loss of several hundreds of thousands of Bitcoins, valued at almost 500 million of US dollars (Badev & Chen, 2014). Therefore, such security breaches create mistrust in Bitcoin, even if basically the technology used is considered very safe. Moreover, as Böhme *et al.* (2015) points out Bitcoin blacklists could let law enforcement claw back all ill-gotten or stolen Bitcoins.

Moreover, the electronic handle of Bitcoins, based on the pair of public and private keys creates the possibility of losing Bitcoins or even destroy them if the information regarding this keys are lost or damaged. Such problems were revealed by the episode from October 2011 when 2,609 Bitcoins were sent to invalid scripts making them impossible to satisfy or redeem and leading to the destruction of that Bitcoins.

Another issue which affects trust in Bitcoin of the potential users is linked with the ideas that Bitcoin may be in fact only a sort of a Ponzi scheme or may be involved in such schemes. The first idea is sustained by the fact that as in a Ponzi scheme, its users can enter the network by exchanging fiat currencies for Bitcoin, but in order to recover their money they need to sell Bitcoins to other

new users. The second concern has already proven to be true, an example being the Bitcoin Savings & Trust Fund (BST) which operated in US and was finally closed in 2012, creating a fraud of over 60 million US Dollars (Turpin, 2014).

At the same time, even Bitcoin was the very first cryptocurrency and gained a significant reputation from this point of view, since its creation there have appeared also other cryptocurrencies such as Ether, Ripple, Litecoin, etc. which are competing now on the market and threaten the leading position of Bitcoin. In this regard, it is significant that in March 2018 there are almost 4.6 thousands of such cryptocurrencies competing on the market (CryptoCoinCharts, 2018).

On the other hand, Bitcoin creates itself threats for the entire society because of its characteristics and especially due to the anonymity of the participants, which makes it suitable to be used in financing illegal or even criminal activities, such as terrorism, money laundering, trade of narcotics or arms, tax evasion, etc., with very limited or no solutions for the authorities to prevent such transactions. Even in some cases the authorities succeeded to intervene as in the case of Silk Road website which was selling over 340 kinds of illegal drugs and was closed by FBI in 2013, there is no doubt that there are still also other illegal transactions or participants which are still operating using Bitcoin and according to Chertoff (2017) Bitcoin has become the standard currency on the Dark Web, where most of the illegal transactions take place.

From another point of view, being involved in intermediating sells of goods and services, Bitcoin also impacts on the general monetary flows and may affect the policies of the central banks or of the governments, creating potential threats regarding their fulfilment. Furthermore, there are fears regarding a possible speculative attack of Bitcoin users on some traditional currencies, in which case there are now very limited solutions.

5. REGULATING BITCOIN – AN ISSUE UNDER DEBATE

Based on the previous considerations it becomes thus obvious that one way or another Bitcoin and, generally, all cryptocurrencies are becoming a reason for concern for the authorities which are confronted with the question on whether and how to counteract the negative effects of this kind of currencies. However, there are many contradictory opinion regarding both the idea of regulating Bitcoin or not and the ways to regulate it if possible.

Concluding on the issue of regulating Bitcoin, Turpin (2014) points out that while Bitcoin is not illegal according to the regulations from almost every country, brings also important advantages compared to fiat currencies and is difficult to be directly targeted by governments, it should not be subject of any attempt of the governments to outlaw or stop it. He suggests also that, instead of such measures it would be more appropriate for the governments to adapt their regulations to the new technologies which are changing the world inevitably.

On the other hand, most of the authors (Gans & Halaburda, 2013; Böhme *et al.*, 2015) are considering that because of its impacts on the economy and on the society, many of them threatening their development, it is necessary to find ways for regulating the use of Bitcoin. Moreover, also authorities and important international financial bodies such as the European Central Bank (ECB 2012), the International Monetary Fund (IMF, 2016) or the Bank for International Settlements (BIS, 2015) have expressed their concerns upon Bitcoin and analysed possible ways to regulate it.

Across the world, governments have different points of view regarding Bitcoin and its regulation, mostly depending on how they perceive it to have more advantages or to bring too many threats to their economy and society.

Even if Bitcoin is extensively used in the United States, which seems to offer very convenient regulations regarding it, the general legal framework is however a complex one, while it relies both on federal and state laws. Therefore, we note that legal regulations applied to Bitcoin and other cryptocurrencies differ among the federal states and also cover only some of the legal issues regarding this kind of currencies. For instance, according to federal law only some types of businesses, such as those of Bitcoin exchange, must be registered and need to get licenses for operating in each of the states. On the other hand, despite of the many concerns of several organisms, as The Financial Advisory Council or FBI, regarding the threats of Bitcoin on the banking system, economy and financial stability, but also regarding criminal activities, many states, starting with California, New York, Washington etc. have authorized its use and issued also some minimal rules for it. Beside these different legal regulations regarding the use of Bitcoin, in US there are also differences regarding the way Bitcoin is perceived, either as money or property or stock commodity, which leads also to different kind of rules to be applied regarding its use.

Starting from 2014, Canada introduced some specific regulations regarding the use of cryptocurrencies, including Bitcoin. Thus, all cryptocurrency exchanges must register with FINTRAC (Financial Transactions and Reports Analysis Centre of Canada) as money service businesses. Moreover, the regulations on anti-money laundering are applicable to all firms that are involved in operations with such currencies, including reporting suspicious transactions, user identities verification and so on. Transactions with Bitcoins are also subject to taxation rules.

In Australia, Bitcoin and other cryptocurrencies are not considered financial products and as consequence businesses in this area are not requiring any license. However the authorities are applying tax regulations to such activities and are developing new laws regarding the use of cryptocurrencies, for preventing money laundering and terrorism.

On the other hand, Japan has introduced since 2016 a new law requiring that all cryptocurrencies exchange activities had to be registered with the

Financial Services Agency, which is able to supervise this businesses and take actions if necessary. Bitcoin and other cryptocurrencies are considered as assets and are subject of tax regulations.

After taking some measures against the use of cryptocurrencies for some years, Russia has abandoned the idea of banning them and its government started to develop new regulations both regarding the operations cryptocurrencies and also their taxation. However, until now there are still no clear regulations applicable to such operations, but some authors believe that Russia might be the first country to introduce such legislation (Likhuta *et al.,* 2017).

In 2013 the Central Bank of China prohibited banks and exchangers in dealing with Bitcoin and other virtual currencies and forced banks to close the accounts of of clients trading Bitcoin, but later, starting from 2016, it appeared the idea that the digital currencies would be expected to be defined as a human right, suggesting the possible acceptance of them as virtual commodities. According to the Chinese law, the websites involved in Bitcoin operations must be registered by the Telecommunications Bureau and, on the other hand, Bitcoin is subject to taxation rules applied to commodities.

In European Union, concerns and questions regarding Bitcoin or other cryptocurrencies and their use were raised on several occasions and were subject of several reports of the European institutions. However, despite the efforts made towards creating a regulatory framework for these cryptocurrencies, only small steps were made both at the EU level, but also at the level of each of the 28 member countries.

The first concerns regarding Bitcoin and the need for regulating its use was issued in 2012 by European Central Bank (ECB, 2012) and concluded that traditional financial regulation may not be applicable to it. Considering Bitcoin to be a convertible decentralized virtual currency instead of a cryptocurrency, the report showed however that it poses certain risks and there are needed steps towards finding a way for its regulation. Later on, after other more concerns were formulated by European Banking Authority (EBA), in 2016, the European Commission proposed several amendments to the Directive (EU) 2015/849.58 on preventing using financial system for money laundering and terrorism financing, by including specific measures regarding the use of virtual currencies. Thus, some proposals aim to impose mandatory registration and licensing for cryptocurrency exchange operators involved in exchanging cryptocurrencies for fiat money and vice versa, as well as for cryptocurrency wallet providers, while other proposals refer to the necessity of identifying the customers of such businesses and creating a central database for virtual currency users. However, the debates on the treatment of Bitcoin and other cryptocurrencies are far from an end and the problem of regulating their use is still not solved.

On the other hand, we must note that Bitcoin is differently approached at the level of the each of the countries members of the EU. Thus, countries such as

Denmark, Finland, Norway or United Kingdom that consider the virtual currencies to be neither money nor currency and therefore outside the regulatory framework of the financial services. However, in UK the Treasury felt necessary to propose using the anti-money laundering legislation but only for companies involved in cryptocurrency exchange activities. Other countries, as Belgium (BIS, 2015) have imposed much strict regulations going even to a ban on virtual currency-based financial instruments. There are also some countries (France, Sweden, Italy) that have introduced regulations regarding the virtual currency exchangers, in terms of record-keeping, reporting, prudential measures and preventing of money laundering and terrorism financing. Moreover, the multiple ways in which each European country conceives the regulations applicable to Bitcoin come also from the fact that the European countries have different points of view regarding Bitcoin. For example, while Norway or Sweden consider cryptocurrencies to be assets, Germany accepts that cryptocurrencies are a unit of account and therefore the legislation is built starting from this basis.

Despite the fact that around the world countries and international authorities have different approaches regarding Bitcoin and the other cryptocurrencies, one thing remains common for all of them and this is the concern for the possible negative effects it might have on the society and economy. Therefore, such reasonable concerns lead almost inevitably in our opinion to the need for imposing regulatory measures in order to prevent such effects. In this regard, we can identify at least a few categories of regulations on which authorities should concentrate, consisting in rules regarding ensuring consumer protection, organizational and prudential rules for stakeholders, operating rules regarding payment systems and schemes, but also complementary rules for fighting against criminality. Thus, consumer protection measures should aim both preventing the thefts of Bitcoins, but also the aspects of irreversibility of the transactions which may lead to consumer losses. Other measures should have in view the limits of anonymity within the transactions in order both to protect the participants but also to avoid consciously or un consciously involvement of them in criminal activities such as those of money laundering or financing terrorism. Moreover, regulations should target also preventing the potential damaging effects on the functioning of the national and international payment systems.

While the necessity of implementing at least minimum regulations due to the reasons mentioned before, there are however some issues coming from the nature of Bitcoin and, generally, of the cryptocurrencies that raise specific difficulties regarding how and who to be involved in the process of regulation. First of all, the borderless use and the electronic nature of Bitcoin raises difficulties for specific countries to regulate its use, because their use is made on open-source basis and citizens or companies can engage themselves in operations without any barriers. Secondly, while the so-called issuer of Bitcoin remains unknown, this makes difficult for regulators to identify to whom any

charges should be pressed. Thirdly, because of the anonymity features of Bitcoin network, there are significant difficulties in identifying who is responsible for operations that might be associated with possible criminal activities.

In our view there is no doubt that each national government should involve in issuing regulations regarding the use of Bitcoin by its citizens and companies. However, at least because of the difficulties mentioned before, which are faced by all countries, and also because of the common threats brought by Bitcoin use, it appears that the effectiveness of the regulatory measures regarding it can be reached only if in this process would be involved some international institutions with regulatory powers on global scale, such as United Nations or, more appropriate, the International Monetary Fund. In this regard, as Plassaras (2013) proposed, IMF might extend its jurisdiction over Bitcoin, protecting thus the global financial stability, but also making Bitcoin more trustful.

On the other hand, the regulatory measures that can be taken also by the national authorities, in order to prevent the potential negative effects of Bitcoin and other cryptocurrencies, can range from the softest ones, consisting in public warnings and information, to the hardest ones, which may consist in banning its use. However, between such extremes there can be found middle ways for solving the problems regarding Bitcoin. One solution can be the interpretation of the existing legislation in a way that makes it applicable also for Bitcoin. Another solution might rely on creating at least some basic regulations regarding the administrators and intermediaries of Bitcoin, who should comply with specific rules regarding reporting, record-keeping, preventing money laundering and financing terrorism, but also regarding consumer protection. A third solution might also be to introduce a much complex set of regulations, similar to the one applicable in the case of traditional currencies, targeting all sensitive areas which include consumer protection, stakeholders protection, payment systems and schemes protection, but also fighting against criminality.

Moreover, because Bitcoin, as well as other virtual currencies, have both similar characteristics with traditional currencies and with financial assets, in our opinion, the regulations that might be implemented should be designed by combining the specific regulations for traditional currencies with the ones regarding the financial assets.

6. CONCLUSIONS

Based on the cryptographic technology, Bitcoin appears to be an innovative yet peculiar instrument meant to offer an alternative to the traditional currencies. In this regard, even if from many point of views its characteristics make it similar to the traditional money, on one hand, its volatility puts it much closer to a financial asset, on the other hand, and therefore continues to fuel disputes regarding the way it may be perceived.

There are significant features of Bitcoin, such as the safe "blockchain" technology it uses, being a private and decentralised virtual currency, being a cheaper but international medium for payments and also keeping the anonymity of the participants in transactions, which are viewed as major qualities.

Despite these qualities, somehow almost the same features create uncontrollable possibilities to bring also important threats towards economy and society. Beside the issues regarding consumer protection, because of its characteristics, and especially of the anonymity in transactions and its borderless use, Bitcoin may become an convenient instrument for financing illegal or even criminal activities, such as terrorism, money laundering, trade of narcotics or arms, tax evasion, etc., while it leaves very limited solutions for authorities to counteract them. Moreover, by intermediating sells of goods and services, Bitcoin has impact on the general monetary flows can affect monetary or governmental policies, threatening their fulfilment. It also creates premises for potential speculative attacks users on traditional currencies, which might be difficult to prevent or to solve. Therefore, we consider that regulating Bitcoin and generally the cryptocurrencies must be taken into consideration, even if such an idea might be a complicated task.

We consider that each national government should take actions including issuing specific regulations regarding Bitcoin and its use by its citizens and companies. Such actions might be either softer as public warnings and information, or harder up to banning Bitcoin use. There are possible also middle solutions consisting is enlarging the area of applicability of existing regulations to cover also Bitcoin use or creating basic regulations regarding consumer protection, reporting, record-keeping, preventing money laundering and financing terrorism mandatory for administrators and intermediaries of Bitcoin or introducing a much complex set of regulations, similar to the one applicable in the case of traditional currencies.

However, because of the common threats brought by Bitcoin borderless use for all countries, it would be more appropriate to involve in the regulatory process the international institutions with regulatory powers on global scale, out of which the International Monetary Fund is placed in the most favourable position. Thus, by extending its jurisdiction over Bitcoin, IMF can protect more efficiently the global financial stability and by doing it can increase the public trust in Bitcoin. Particularly, for the European Union area, a major role might be played in this regard by the European Commission. Also, this regulating process might be helped by appealing at the expertise of some international institutions such as Bank for International Settlements and World Bank.

We also consider that because of the characteristics of Bitcoin or other virtual currencies, their regulating framework should be designed by combining and adapting regulations both applied for traditional currencies and for financial assets.

References

1) Badev, A. and Chen, M. (2014). *Bitcoin: Technical Background and Data Analysis.* Federal Reserve Board, Divisions of Research & Statistics and Monetary Affairs, Finance and Economics Discussion Series, [online] Available at: http://bitcoin-class.org/readings/fedreserve.pdf [Accessed 01.03.2018].
2) BIS - Bank for International Settlements, (2015). Digital currencies. *BIS Report*, [online] Available at: https://www.bis.org/cpmi/publ/d137.htm [Accessed 04.03.2018].
3) Blockchain Luxembourg S.A.R.L., (2018). *Blockchain's Website.* [online] Available at: www.blockchain.com [Accessed 01.03.2018].
4) Böhme, R., Christin, N., Edelman, B. and Moore, T. (2015). Bitcoin: Economics, Technology, and Governance. *Journal of Economic Perspectives*, 29(2), pp. 213–238.
5) Carick, J. (2016). Bitcoin as a Complement to Emerging Market Currencies. *Emerging Markets Finance and Trade*, 52(10), pp. 2321-2334.
6) Chertoff, M. (2017). A public policy perspective of the Dark Web. *Journal of Cyber Policy,* 2(1), pp. 26-38.
7) CryptoCoinCharts, (2018). *Cryptocurrency Market Capitalizations.* [online] Available at: https://www.cryptocoincharts.info/coins/info [Accessed 04.03.2018].
8) ECB - European Central Bank, (2012). Virtual Currency Schemes. *ECB Report,* [online] Available at: http://www.ecb.int/pub/pdf/other/virtualcurrency schemes201210en.pdf [Accessed 08.03.2018].
9) Elwell, K. C., Murphy, M. M. and Seitzinger, M. M. (2015). Bitcoin: Questions, Answers, and Analysis of Legal Issues. *Congressional Research Service Report 7-5700,* [online] Available at: https://fas.org/sgp/crs/misc/R43339.pdf [Accessed 01.03.2018].
10) Gans, J. S. and Halaburda, H. (2013). Some economics of private digital currency. *Bank of Canada Working Paper No. 2013–38,* [online] Available at: https://www.bankofcanada.ca/wp-content/uploads/2013/11/wp2013-38.pdf [Accessed 08.03.2018].
11) Glaser, F., Zimmermann, K., Haferkorn, M., Weber, M. C. and Siering, M. (2014). Bitcoin-asset or currency? Revealing users' hidden intentions. In: *Twenty Second European Conference on Information Systems.* Tel Aviv, 14 p.
12) IMF - International Monetary Fund, (2016). Virtual Currencies and Beyond: Initial Considerations. *IMF Staff Discussion Note,* [online] Available at: https://www.imf.org/external/pubs/ft/sdn/2016/sdn1603.pdf [Accessed 01.03.2018].
13) Kancs, d'A., Ciaian, P. and Rajcaniova, M. (2015). The Digital Agenda of Virtual Currencies. Can Bitcoin Become A Global Currency?, *European Commission JRC Technical Report 27397,* [online] Available at: http://publications.jrc.ec.europa.eu/repository/bitstream/JRC97043/the%20digital%20agenda%20of%20virtual%20currencies_final.pdf [Accessed 01.03.2018].
14) Likhuta, V., Kaplan, A., Gadomsky, D., Korol, K., Heletkanych, O., Havryliak, O. and Otter, T. (2017). Bitcoin Regulation: Global Impact, National Lawmaking. *Axon Partners & ForkLog Research Report,* [online] Available at: http://forklog.consulting/bitcoin_regulation_en.pdf [Accessed 08.03.2018].

15) Nakamoto, S. (2008). *Bitcoin: A Peer-to-Peer Electronic Cash System.* [online] Available at: http://www.bitcoin.org/bitcoin.pdf [Accessed 01.03.2018].
16) Maurer, B., Nelms, T. C. and Swartz, L. (2013). When Perhaps the Real Problem is Money Itself!: The Practical Materiality of Bitcoin. *Social Semiotics,* 23(2), pp. 261–277.
17) Plassaras, N. (2013). Regulating digital currencies: bringing bitcoin within the reach of IMF. *Chicago Journal of International Law*, 14(1), pp. 377-407.
18) Rogojanu, A. and Badea, L. (2014). The issue of competing currencies. Case study–Bitcoin. *Theoretical and Applied Economics,* 21(1), pp. 103–114.
19) Staiger, R. W. and Sykes, A. O. (2010). Currency manipulation and world trade. *World Trade Review*, 9(4), pp.583–627.
20) Turpin, B. J. (2014). Bitcoin: The Economic Case for a Global, Virtual Currency Operating in an Unexplored Legal Framework. *Indiana Journal of Global Legal Studies,* 21(1), pp. 335-368.
21) Van Alstyne, M. (2014). Why Bitcoin has value. *Communications of the ACM 57* (5), pp. 30–32.
22) Velde, F. (2013). Bitcoin: A Primer. *Chicago FED Letter,* no. 317. The Federal Reserve Bank of Chicago.

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Section III

EU FINANCIAL REGULATION AND ADMINISTRATIVE AREA

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A COMPARATIVE ANALYSE OF SOCIAL DIALOG IN EUROPEAN ADMINISTRATIVE AREA

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Abstract
Due to the challenges from social and economic environment, the labour relations in European Union face a fast changes. The diversity of national systems is one of the most important factors that reflect the discrepancies among European member states. Our paper proposes a comparative analyse of social dialog in European member states. Our analyse reveal that in the countries where the social dialog is most structured, the competitiveness and resilience of economic and social system are assured, and in the countries where social dialog is not widely establish, the social dialog becomes part of a mix of social and political decisions with a great impact in society (i.e. financial aid, Troika – European Commission, European International Bank and International Monetary Found). The methodology approach is based on the reports of European Commission, data from open access database of ICTWSS and International Labour Organization.
Keywords: *social dialog, labour relations, European administrative area.*
JEL Classification: J51, J58, J83

1. INTRODUCTION

Social dialog is a concept with many understandings: consultation between governments and representatives of employees, negotiations and exchange of information on issues related to economic interest, social rights and duties, job security and seniority, rights of employers and employees, work conditions, payments and social benefits, unemployment, unfair labour practices and contract enforcement, grievance and disciplinary procedures, arbitration process.

International Labour Organization (ILO) defines social dialog as „all types of negotiation, consultation or simply exchange of information between, or among, representatives of governments, employers and workers, on issues of common interest relating to economic and social policy" (ILO, 2013). Also, ILO refers at the two types of social dialog: *tripartite* dialog, a process among representants of government, trade unions and employers organizations and *bipartite* dialog, a process between trade unions and employers organizations. Social dialog it was interpreted as one of the principle that sustain the European social model, based on good economic performance, a high level of social

protection and education and social dialog. In Europe, the concept of social dialog between the governments, employers organizations, trade unions are accepted as part of good governance, even if differ from each country to another (Rychly and Protzer, 2003).

Social dialog represents a component of social and economic life, being part of framework which insures rigidities and understandings between social partners, trade unions and employers, and certain governmental factors that seek to harmonize employers' interests with those of employees in order to ensure a climate of stability and social peace (Tofan and Petrisor, 2013).

Our paper use the term of social dialog as it was described by ILO, completing the research with the wording give by European institutions during the time.

2. SOCIAL DIALOG – EUROPEAN LEGAL FRAMEWORK

In European Union, *bipartite* dialog was defined in the Treaty of Rome, as one of the social task of the Commission in order to promote close cooperation between Member States, considering the rights and duties of employees and employers (Kennedy, 2018). These provisions were not applied many years after the adoption of Treaty of Rome. In 1985, Jaques Delors, the president of the Commission, during the Val Duchesse social dialog process, proposes to involve the social partners, represented by European Trade Union Confederation (ETUC), the Union of Industries of the European Community (UNICE) and the European Centre of Public Enterprises (CEEP), in the process of internal market on the issues of education, training and employment. This represents the base for the Single European Act (article 118b, 1986) about wide social dialog. The work was continued by the European social partners, so, in 1991, UNICE, ETUC and CEEP adopted a joint agreement that have had as a main role to prepare the legislation of social affaires. This was the Agreement of Social Policy annexed to Maastricht Protocol on Social Policy. The Agreement was sign by all the states, except United Kingdom. The Treaty of Amsterdam includes the Agreement of Social Policy, allowing a single legal framework for the European Member States. The issues as parental leave (1995), part-time working (1997) and fixed-term work (1999) were implemented by Council directives. The Commission must consult the social partners before taking an action in the field of social policy, according with the provision of Treaty for European Union (Article 154). In order to assure a common legislation for European Member States, the Commission proposed the directives and decisions in a wide area of social issues: temporary agency work (Directive 2008/104/EC), organization of working time (Directive 2003/88/EC) which have many resolutions and, in 19 January 2017 on a European Pillar of Social Rights, Parliament has included the provisions, working conditions in civil aviation (2000), sectorial social dialog (Commission Decision 98/500/EC), on certain aspects of the working conditions of mobile workers in interoperable cross-border services in the railway sector

(2005) (Kennedy, 2018). According with specialists, EU law contains harmonized rules, mainly through directives (Tofan, 2017). The Lisbon Treaty stated that 'the Union recognizes and promotes the social partners at its level, taking into account the diversity of national systems and that will facilitate dialog between the social partners, respecting their autonomy'. During the financial and economic crisis, the European Union faces to pressures on social dialog, due to its decentralization, decline in bargaining coverage and wage policy.

The *tripartite* dialog has a very long evolution. Starting with the Consultative Committee for Coal and Steel and the European Economic and Social Committee, the developing of the tripartite dialog means to offer a framework of debate on social issues for governments, employers' organizations and trade unions. A key of the tripartite social dialog was the Standing Committee on Employment (1970-2003), composed by 20 representatives of the social partners, and equally divided between employers' organizations and trade unions. In 2003, the committee was replaced by Tripartite Social Summit for Growth and Employment through Council decision (EU) 2016/1859. The main aim of the Summit was to facilitating the ongoing consultation on economic, social and employment issues. The Lisbon Treaty affirm a key role for the European Parliament to be informed about the implementation of collective agreements concluded at Union level (Article 155 of Treaty of European Union) and about the Commission initiatives to encourage cooperation between Member States (Article 156 from Treaty of European Union), also the right of association and collective bargaining between employers and workers. Parliament highlighted that the social dialog is very important for the objectives proposed by Europe 2020 Strategy: job creation, social welfare and social dialog. In Troika resolution from 2014 (the European Central Bank, The Commission and the International Monetary Fund) discussing about the euro-programme countries, it reveal that, at national level, a major role is played by social partners which should be consulted or involved in the design of these programmes. On 15 February 2017, on European Semester, a resolution reiterates the importance of social dialog and the role of social partners into the governance process at European Union level. On 2018 were made the proposals by the Parliament, for employment policies of the Member States, calling the Commission and Member States to consultation with social partners.

Even if, at European level, the normative framework reflect the fact that the European Union has major role in establishing the provisions and legal rules in order to assure the social policy and to promote the social systems, to adapting to the new developments in the labor market and to adapt at new type of forms of work (teleworking, working time, flexibility, digitalization of work, etc.). It reveal that the European Union has the major role to adapt the European labor market at the changing world of work and to create a common place for debates in these issues, however, in the European administrative space are different

systems of social dialog due to the socio-economic, political, cultural and administrative systems from each European Union Member State. From this point of view, our paper aim to debate the differences and the common issues of the social dialog, using databases of the worker-participation.eu and ICTWSS: *Database on Institutional Characteristics of Trade Unions, Wage Setting, State Intervention and Social Pacts*, official statistics and reports.

3. CENTRALISATION OR DECENTRALISATION IN SOCIAL DIALOG IN EU MEMBER STATES

In European Union are a wide range of institutions that serve the social dialog, in terms of market, legislation and industrial relations. The market is the factor that influences the equilibrium between the state and labor force, and difference between labor and cost productivity (Bercu and Vodă, 2017). The legislation should provide the legal framework for the dialog between government, employers organisations and trade unions. The bargaining process indicates if conditions and requirments of the work are in accordance with legal provisions. It is a variety of levels were the social dialog is implied as a factor of sustainability and equilibrum on the market. This variety of systems could be explained through a different economic, social, political, cultural and administrative framework and also, by the role of the state in society (Hessel, 2008). The level of negotiation reflect the capacity of social partners to discuss, reflect and take the decision which reflect the common agreement. In the European Union Member States are differences between the states which provide centralised social dialog or decentralised systems. Are states which have a very centralised social dialog systems (the bargaining process take place at the central level), countries with decentralised systems (the bargaining process is split between central and local or sectorial level) and, multi-level dialog-structures which implies elements of centralised and decentralised systems (Table 1).

Table 1. Social dialog systems in EU Member States

Country	Centralized or decentralized social dialog systems in EU Member States
Austria	Centralized
Bulgaria	Centralized
Czech Republic	Centralized
Greece	Centralized
Luxembourg	Centralized
Poland	Centralized
Slovenia	Centralized
France	Largely centralized
Hungary	Largely centralized

Country	Centralized or decentralized social dialog systems in EU Member States
Italy	Largely centralized
Malta	Largely centralized
Portugal	Largely centralized
Spain	Largely centralized
Croatia	Largely centralized
Belgium	Both centralized and decentralized
Cyprus	Both centralized and decentralized
Denmark	Both centralized and decentralized
Germany	Both centralized and decentralized
Finland	Both centralized and decentralized
Ireland	Both centralized and decentralized
Latvia	Both centralized and decentralized
Lithuania	Both centralized and decentralized
Romania	Both centralized and decentralized
Slovakia	Both centralized and decentralized
Estonia	Decentralized
Holland	Decentralized
Sweden	Decentralized
United Kingdom	Largely decentralized

Source: adapted after Hessel (2008)

Fourteen countries have centralized or largely centralized social dialog systems, ten countries are characterized by a mix between centralized and decentralized social dialog systems (the bargaining process take place at central and local levels), and four countries have decentralized social dialog process, where the bargaining process take place at local level.

To demonstrate the differences among EU Member States in terms of social dialog systems, we choose to use the data provided by ICTWSS Database. version 5.0. (Visser, 2015). Right of collective bargaining for government sector (RCB_g) is the indicator which describes the role of government to assure that the workers from public sector are free to organize in trade unions, to improve their working conditions and to bargain with the authority of state. The indicator Right of collective bargaining for market sector describes the rights of the workers to negotiate with the representants of the employers and being represented at the negotiation process (RCB_m). In order to demonstrate if the social dialog implies a formal rule in order to negotiate, we choose the indicators social pact, agreements and the type of pacts. Social pact is defined as „publicly announced formal policy contracts between government and social partners over income, labor market or welfare policies that identify explicitly policy issues and targets,

means to achieve them, and tasks and responsibilities of the signatories" (Avdagic, Rhodes and Visser, 2011). This excludes tacit understanding or agreements that are not publicly announced, bilateral agreements between employers organizations and trade unions that do not involve the government as negotiating party, even if implementation requires legislative action or government support and, so called symbolic or declaratory pacts that do not commit the negotiation parties to specific tasks and responsibilities (Visser, 2015). Another indicator used in our analysis is 'Works councils and employee representation in the enterprise' describe as the existence of works councils for employee representation within firms (union or non-union based), the types of them and the right to negotiate with the management of the firms (WC – status of works councils and WC_struct – the structure of the works councils) (Visser, 2015) (Table 2).

Table 2. Descriptive indicators (available for 2014)

EU Member State	RCB_g	RCB_m	PactSign	AgrSign	Aut_W	PactType	WC	WC_struct
Austria	0	3	0	-*	0	0	2	3
Belgium	2	3	0	0	0	0	2	3
Bulgaria	0	3	0	0	0	0	1	2
Croatia	3	3	-*	-*	-*	-*	2	2
Cyprus	2	3	0	0	0	0	1	2
Czech Republic	2	3	0	0	0	0	1	2
Denmark	3	3	0	0	0	0	2	4
Estonia	2	3	0	1	0	0	2	2
Finland	3	3	0	0	0	0	2	4
France	2	3	0	0	0	0	2	3
Germany	1	3	0	0	0	0	2	3
Greece	3	3	0	-*	-*	-*	-*	-*
Hungary	1	3	0	0	0	0	2	3
Ireland	2	3	-*	-*	-*	-*	-*	-*
Italy	2	3	0	0	0	0	2	4
Latvia	0	3	0	0	0	0	1	2
Lithuania	3	1	0	0	0	0	1	2
Luxembourg	0	3	0	0	0	0	2	3
Malta	2	3	0	0	0	0	1	2
Netherlands	3	3	0	0	0	0	2	3
Poland	1	3	0	0	0	0	2	2
Portugal	2	3	-*	-*	-*	-*	-*	-*
Romania	0	3	-*	-*	-*	-*	1	2
Slovakia	3	3	0	0	0	0	2	2
Slovenia	3	3	0	1	0	0	2	3
Spain	3	3	0	1	0	0	2	3
Sweden	3	3	0	0	0	0	-*	-*
United Kingdom	-*	-*	0	0	0	0	2	2

*-, data are not available in the database

Source: based on the data provided by ICTWSS Database and Visser (2015)

For the states like Austria, Bulgaria, Latvia, Luxembourg and Romania the value of the indicator Right for collective bargaining, government sector is 0, which show that the government preferred to keep a relatively tight hand on economic and social reforms. For the governmental sector from Romania, Latvia and Bulgaria, the social dialog is tripartite and reflects the still remaining control process from socialistic period. Governments are now strongly involved in the social dialog with social partners in all the important issues regarding wages, working conditions, social security, and social assurance. In the mean time, the right of collective bargaining, market sector is characterized by the value 3 of the indicator that reflect a largely possibility for firms and enterprises to negotiate within their trade union and representatives of organizations employers. The value 1 characterizes the states as Hungary, Germany and Poland and reflects the right of collective bargaining in government sector, but with major restrictions (e.g. monopoly union, government authorization, limitations on content, major groups excluded). In the mean time, for those states, the right of collective bargaining, market sector has the value 3, and reflects that their trade unions or works councils represent the workers. Value 2 is attributed to nine European states (Belgium, Cyprus, Czech Republic, Estonia, France, Ireland, Italy, Malta and Portugal) where the indicator reflects the right to bargain with minor restrictions (e.g. registration, thresholds, only military, judiciary or police excluded – as per ILO convention). For the indicator Right of collective bargaining, market sector the value is 3, assuring the bipartite dialog between the organizations of employers and trade unions or works council's representants. Value 3 of the indicator is attributed to states as Croatia, Denmark, Finland, Greece, Lithuania, Netherlands, Slovenia, Spain and Sweden and reflects that the government is totally implied at the negotiations with social partners. Except Lithuania, where the value of the indicator for market sector is 1 and show that the bipartite dialog is present, but with major restrictions ((e.g. monopoly union, government authorization, limitations on content, major groups excluded), the other states have the value 3 for the indictor, being part of the rest of the social dialog systems from European Union. For United Kingdom the data were unavailable for these two indictors.

As we can observe, the data for the sign pact between the government, the unions and the employers' representants, or between the government and the unions, sign in a specified year, show that the pacts are not sign or are not provided data. For agreement between the central organizations of the trade unions and the employers' representants, only Estonia, Slovenia and Spain have agreements sign (value 1).

The indicators that reflect the existence of works council and employee representation in the enterprise are status of the works council and the structure of the works council representation (Visser, 2015). Value 2 of the indicator shows the existence and rights of works council or structure for (union and non-

union-based) employee representation within firms or establishments confronting management are mandated by law or established through basic general agreement between unions and employers and it is available for seventeen countries from EU; for other six countries (Romania, Lithuania, Latvia, Czech Republic, Cyprus and Bulgaria) the value of the indicator is 1 and reflect that the works councils are voluntary, even where they are mandated by law, there are no legal sanctions for non-observance. For the states which have the indicator structure of works council representation 4, means a single-channel works councils, union-based representation, elected by union members or established by union, based on law or national agreement (Denmark, Finland, Italy); value 3 means dual-channel works councils, union dominated representation, elected by union and non-union members, based on law or national agreement (Austria, Belgium, France, Germany, Hungary, Luxembourg, Netherlands, Slovenia, Spain); value 2 represents the split-channel works councils, employee elected works councils are mandatory where there is no or insufficient union representation, as a structure supplementary to the union, based on law or national agreement (Bulgaria, Croatia, Cyprus, Czech Republic, Latvia, Lithuania, Malta, Poland, Romania, Slovakia and United Kingdom).

4. CONCLUSIONS

The main aim of our paper was to make a comparative analyze of the social dialog in European Member States. The main findings of our research show that it is difficult to set a common trend for all the states of European Union due to the particularities from each country. Even if, at European level it is create the normative framework to develop, sustain and implement the social policy (as social policy model), are substantial differences between countries given by traditions, social and political systems, administrative framework, institutional and historical structures which make the social dialog systems to reflect this in their mechanisms. Even if, the systems are diverse, we can however observe that the European social model, through the provisions and norms, institutions and structures from European level, offer the major objectives of social policy which are follow by all the Member States. Could be observe also that are two dimensions of social dialog in European Union Member States and a mix between these systems: a centralized system, reflected through the tripartite and bipartite social dialog and active participation of state in creation the norms and structures, policies and tools to assist the implementation of social policy from the central level and a decentralized system, where the social dialog is applied at local or sectorial level, implied the tripartite or bipartite dialog with all the social partners.

In our research we used the data provided by ICTWSS Data base, version 5.0. of Amsterdam Institute for Advanced Labor Studies AIAS. The chosen indicators used by us were right of collective bargaining, governmental sector and right of collective bargaining, market sector, sign pact and work councils of

employees' representation. The comparative analysis shows the necessity to interpret the data for each country in order to distinguish between commonalities and the differences of social dialog systems.

References

1) Avdagic, S., Rhodes, M. and Visser, J. (2011). *Social Pacts in Europe.* Oxford: Oxford University Press.
2) Bercu, A.M. and Vodă, A.I. (2017). Labor Relations: Contemporary Issues in Human Resource Management. In: E. Lipovic, ed., *Issues of Human Resource Management,* 1st ed. Croatia: InTech, pp.153-167.
3) Hessel, R. (2008). *Comparative Analysis: The Social Dialogue in the Central Public Administrations of the EU Member States.* [online] Available at: https://www.dgaep.gov.pt/upload/RI_estudos%20Presidências/study_social_dialogue_2008_en.pdf [Accessed 15.06.2018].
4) ICTWSS: Database on Institutional Characteristics of Trade Unions, Wage Setting, State Intervention and Social Pacts in 51 countries between 1960 and 2014, University of Amsterdam. [online] Available at: http://uva-aias.net/en/ictwss [Accessed 10.06.2018].
5) International Labor Organization, (2013). *Regulating the employment relationship in Europe: a guide to Recommendation No. 198.* Geneva: International Labour Office, Governance and Tripartism Department. [online] Available at: https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/--dialogue/documents/publication/wcms_209280.pdf [Accessed 12.06.2018].
6) Kennedy, A. (2018). *Fact Sheets on European Union.* [online] Available at: http://www.europarl.europa.eu/RegData/etudes/fiches_techniques/2017/N54586/en.pdf [Accessed 12.06.2018].
7) Rychly, L. and Protzer, R. (2003). *Social Dialog at National Level in the EU Accesion Countries (Working Paper).* International Labor Organization, Geneva, [online], 45 p. Available at: http://www.ilo.org/wcmsp5/groups/public/---europe/---ro-geneva/documents/meetingdocument/wcms_366163.pdf [Accessed 10.06.2018].
8) Tofan, M. (2017). Excise Duties in European Union. Relevant National Case-Law. In: *6th International Conference on Perspectives of Business Law in the Third Millennium.* Bucharest: Bucharest University of Economic Studies, pp. 133-146.
9) Tofan, M. and Petrisor, M.B. (2013). *Dreptul muncii. Curs universitar.* Bucuresti: Hamangiu.
10) Visser, J. (2015). ICTWSS Database. version 5.0. Amsterdam: Amsterdam Institute for Advanced Labour Studies AIAS. October 2015. Available at: http://uva-aias.net/en/ictwss [Accessed 10.06.2018].

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TRANSPARENCY IN THE MUNICIPALITY SPENDING: FINANCIAL HEALTH INDEX

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Abstract
Local governments in the Czech Republic have an advisory role to their municipalities. A ministry of finance defined a set of financial indicators (SIMU system) which could be used for financial health evaluation, but only two of them are obligatory. The SIMU system includes four main groups of indicators, when only two of them are monitored by Ministry of Finance (a share of liabilities to total assets in %, and the current ratio. Indisputable advantage is its standard form of financial evaluation for all municipalities and relatively simple method of calculation based on delivered data. Main disadvantage can be seen in the fact that the municipality receives feedback only for two indicators, which have a recommended value. The municipality does not get a clear idea of the state of its cash position and this approach is not taking into account short-term and long-term indebtedness as well as the size of the municipality. Main goal of the paper is to present results of project made in cooperation with local government in Moravian-Silesian region to support transparency in the municipality spending, when own methodology of financial health of municipalities was developed and tested. This approach supports citizen's engagement into public matters through standardized approach to each municipality based on seventeen ratios.
Keywords: *financial ratios; financial health; performance management; spending transparency.*
JEL Classification: H72, H83, R58

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1. INTRODUCTION

Attention to the financial health measurement (FH) of local governments and municipalities is not new. Researchers and practitioners (Tkáčová and Konečný, 2017; Clark, 2015) have been trying for last decades to solve questions about the measurement and forecasting of financial and fiscal problems at different governmental levels in terms of financial health (FH) and fiscal stability (FS). The key problem with non-clear definition in the area was mentieoned by Padovani *et al.* (2010, p.3) when it is pointed out, that financial health is mostly highlighting its negative side such as "fiscal distress", "financial risk", "fiscal crisis", or "fiscal strain".

Theoretical approach to this problem could be seen in different definition, when financial health is recognized as the ability of the government to fulfil its obligations (Gorina, Maher and Joffe, 2018; Hendrick, 2004). Opposite to that, Berne and Schramm (1986) use fiscal stability concepts and financial health as synonyms. A ratio analysis could be used to simplify interpretation within results and to be able to evaluate the development (Bird, 2015; Jacob and Hendrick, 2013). Following that McDonald (2017, p.2) summarizes measurement of financial health into four areas: (1) to be able to accomplish immediate or short-term financial obligations; (2) to be able to meet its financial obligations over a budgeted fiscal year; (3) to be able to accomplish long-term financial obligations; and, (4) to be able to finance the base level programs and services as required by law. Cabaleiro, Buch and Vaamonde (2013) added that according to earlier works of Groves, Godsey and Shulman (1981) would be useful to care about be structured in cash solvency, budgetary solvency, long-run solvency and service-level solvency, it means area of liquidity. Studies in municipality financial health and ratios are very popular between rating agencies (Fitch, 2016; Moody`s, 2013; Standard and Poors, 2010).

2. LEGAL BACKGROUND OF MUNICIPALITY FINANCIAL MANAGEMENT IN THE CZECH REPUBLIC

Municipalities in the Czech Republic are public corporations that can own property and manage the budget (Act No. 128/2000 Coll., Status of Municipalities). First regulatory acts in area of public finance management were Government Resolution No. 346/2004 on *Municipality and Regional Debt Regulation* within use of *Debt Service Indicator* as regulative tool in the area of FS management of municipalities. Subsequently, it was replaced by Government Resolution No. 1395/2008 on *Financial Monitoring of municipalities*. From February 2017, the indebtedness of municipalities is limited by Act No. 23/2017 Coll. (On budgetary liability rules) and by Act No. 24/2017 Coll., which amends some laws in connection with the adoption of the legislation on budgetary liability. Act No. 23/2017 Coll. applies to public institutions, which are, among others, territorial self-governing units (SGUs) and therefore municipalities. The

Law on Budgetary Rules sets a debt braking rule (Section 14) and a numerical fiscal rule (Section 17) for the SGUs. The debt braking rule is set as follows: if the public sector debt ratio is at least 55% of the nominal GDP, the municipality must approve its budget for the following year as balanced or surplus. The budget can be compiled as deficit only if the conditions laid down in Section 4 (6) of Act No. 250/2000 Coll. The fiscal rule imposes an obligation on the municipality to manage its debt so that its debt does not exceed 60% of its average earnings for the last four financial years. If this limit is exceeded, the municipality is obliged to repay the previous debts by at least 5% of the difference between the amount of the debt and 60% of its average earnings for the last four financial years. Thus, the defined fiscal rule does not prevent municipalities from taking credit for financing their projects even if the municipality exceeds the 60% threshold if in the following years it is repaid by at least 5% of the difference between the level of debt reached and 60% of the average income for the last four financial years.

The Ministry of Finance checks financial health of municipalities through sixteen informative and two monitoring indicators, which all form a Set of Informative and Monitoring Indicators (Czech: SIMU indicators). Those SIMU indicators (structure and description of its calculations MF ČR, 2017a) are based on the accounting documents of the municipalities (financial statement FIN 2-12, balance sheet, profit and loss statement). Those indicators and are not grouped or evaluated according to areas of economic evaluation (e.g. budget, revenues, expenditures). The disadvantage of that analysis is that the municipality receives feedback only on two compulsory indicators for which the recommended values are calculated. The municipality does not need to get a clear idea of its short-term liquidity or short-term versus long-term indebtedness, nor the size of the municipality taken into account, what set a methodological gap in the Czech environment.

The main goal of the article is to create a set of indicators for assessing financial health for municipalities that use publicly available information. The assessment will be based on two basic assumptions that are important for ensuring the short- and long-term budgetary balance and the sustainability of municipal financing. Specifically, this is the balance of the current budget, which should always be positive (the capital budget may be a deficit) and the maximum debt service (debt repayments plus interest payments) that should not exceed the surplus of the current budget.

3. METHODOLOGY

As well as the budgetary stability of the government, the financial stability and financial health of the municipalities is an important starting point for their long-term sustainable development, as illustrated by the Resolution of the Council of European Municipalities and Regions (CEMR, 2015). The current

indebtedness of local governments as a whole is low and does not threaten the macroeconomic stability of the Czech Republic (MF ČR, 2017b).

Unfortunately, in the case of individual municipalities, it is not always possible to keep the debt at such a level that it does not create risks for further smooth functioning. This could be caused by problems with drawing subsidies, "problematic" investments, or inappropriate financial management of the municipality. Although there are several methods for evaluating municipalities, their disadvantage is that they are primarily used for the needs of central government bodies or legislative institutions, as a supporting instrument for obtaining subsidies or loans. In addition to that, they are often methodologically complex, requiring relatively deep knowledge of financial analysis, and many are being offered on a commercial basis. Opposite to that, smaller municipalities are relatively disadvantaged in terms of their use in financial management and planning, as they do not have the human resources needed to process them, and limited financial resources do not allow the processing of financial analyzes for consideration. However, the obligatory published data can be used for the monitoring and evaluation, for example within the budget, or indicators based on the balance sheet and the profit and loss account.

The process of financial health index evaluation is so complicated. There are several studies (e.g. Cabaleiro, Buch and Vaamonde , 2013; Padovani *et al.*, 2010) on that areas, but they are not fully transferable into other country because of difference of national accounting standards. Under international conditions is often used Brown's 10-point test which covers five dimensions of financial health – Revenue (3 ratios), Expenditure (1 ratio), Operating Position (3 ratios), Debts (2 ratios) and Unfunded Liability (1 ratio). Results of each indicator could be benchmarked within municipality in the same group (by size, location). Benchmark is based on diving results in quartiles (Brown, 1993). Opposite to that Wang, Dennis and Tu (2007) began with the four dimensions of solvency: cash, budget, long-run, and service. Unfortunately, they used mostly generally government's financial ratios as a total of 11 indicators. Under Czech condition was so inspirative a work of Opluštilová (2012) who presented a comprehensive evaluation of the financial health of municipalities in the range of 7 degrees. For the comprehensive evaluation, 5 indicators from the area of budget management with 40% weight, 3 liquidity indicators (weight 20%) and 4 indicators of indebtedness (total weight 40%) were selected. The scales have been set with regard to the importance of the area, taking into account the practice used, in particular, by some regional council authorities when assessing municipalities as applicants for subsidies. However, this way of assessing financial health is not used in practice. This is a challenge to improve that approach and implement that into the practice to be used publicly and for free.

Data collection and analyses

Not only is the overall assessment of all municipalities important, but also the attention paid to individual municipalities. Differences can also be found between regions. The Moravian-Silesian Region (MSR) is among the smaller municipalities (300), with the highest number of inhabitants averaging per municipality (4133 as of 26 April 2017). Between years 2013-2016 iRating was used, unfortunately, municipalities received on average the fourth worst rating compared to other regions within the Czech Republic. On the other hand, in the applications for subsidies MSR municipalities showed the lowest share (22% in 2016) among municipalities that did not receive subsidies (CRIF-CCB, 2017). Main focus of the project with MSR authority is to promote better and easier financial management of municipalities and increase their financial stability.

A combination of secondary and primary sources, causal analysis, in-depth interviews with representatives of 30 municipalities and representatives of MSR were used to process the study as:

- Sources for secondary data were financial statements from 300 municipalities from MSR in years 2010 to 2016;
- Primary data were represented with results of 30 in-depth interview to be able to set appropriate structure of the ration and recommended range.

Using the methods above and a selection of indicators and an expert estimation of the critical values was made as result of the current stage. We expect to precise them in the next stage of the research based on statistical methods. Finally, two key assumptions were defined as important for securing short-term and long-term budgetary balance and sustainability of municipal financing, namely:

- The balance of the current budget should always be positive; the capital budget may be in deficit.
- The maximum debt service (debt repayments plus interest payments) should not exceed the surplus of the current budget.

Finally set of indicators has been proposed for financial stability and financial health in three categories by their nature and content, in respect to the work of Cabaleiro, Buch and Vaamonde (2013), Padovani *et al.* (2010), McDonald (2017), and Opluštilová (2012):

- Indicators evaluating budgetary management;
- Indicators evaluating the municipality's indebtedness;
- Indicators evaluating the liquidity of the municipality.

4. RESULTS

Municipalities form significant part of the public sector and their financial health affects regional public policy, so the results can be interpreted in two layers. The first layer means setting up a set of financial health indicators and the second layer illustrates a sample of evaluation. In this analysis, municipalities

are not sorted by size or location, only a general picture of the financial health of municipalities is created.

4.1 Financial health indicators

Indicators evaluating budgetary management

Budgetary management is an important aspect of the municipality's activity, which could be found in the quality of the operational management and in the generation of resources for the developmental activities of the municipality. Therefore, seven budget indicators were selected (Table 1).

Table 1. Budgetary management ratios

Ratio	Formula	Critical value
Budget Balance (BB)	Total consolidated revenues – Total consolidated expenditure / Total consolidated revenue	BB ≥ 0
Share of Current Budget Surplus on Current Earnings (CBSCE)	Current revenues — Consolidated current expenditures / Current revenues or Tax revenues + non-tax revenues + non-investment transfers received — Consolidated current expenditures) / (Tax revenues + non-tax revenue + non-investment transfers received)	0.25> CBSCE ≥0
Share of Balances in the Financial Accounts and Cash on Current Expenditure (BFACCE)	Short-term financial assets + Long-term deposits / Consolidated current expenditure * 12	4 months > BFACCE ≥ 1 month
Share of Balances in the Financial Accounts and Cash on Current Income (BFACCI)	Short-term financial assets + Long-term time deposits / Current revenues	0.3 > BFACCI ≥ 0.08
Share of Total Consolidated Expenditures on Current Earnings (TCECE)	Total Consolidated Expenses / Current Incomes or Total Consolidated Expenditures / (Tax Incomes + Non-tax Receipts + Non-Investment Transfers Received)	1.2 > TCECE ≥ 1
Share of Received Transfers on Capital Expenditures (RTCE)	Received transfers / Capital expenditures	0.8 > RTCE ≥ 0.4
Share of Own Revenues on Total Revenues (ORTR)	Own Revenue / Total Consolidated Income or (Tax revenues + Non-tax revenue + Capital revenues) / Total consolidated income	0.9 > ORTR ≥ 0.8

Source: authors' elaboration

As is presented the budget balance (BB) is the main indicator in that area of evaluation. Other supplementary indicators assess the basic assumption of long-term successful management of municipalities and their dependence on various types of revenues like own revenues, subsidies and transfers. Expert estimation is to have a reserve for four months to cover operational costs (BFACCE indicator) and to be able for self-financing municipality services.

Indicators evaluating the municipality's indebtedness

The indebtedness of the municipality significantly affects not only the financial health, but also operative management of the municipality. It is therefore one of the key areas of the methodology and therefore eight indicators in total of 8 are monitored. Some of the indicators are based on the SIMU methodology (MF ČR, 2017a). Contrary to SIMU indicators were modified (indicator 4, 6, 7) to do not affect results due to received deposits for investments. An advantage for municipalities could be seen in clarification of the values and possible risks in municipality financial health, which are not available from Ministry of Finance (Table 2).

Table 2. Municipality's indebtedness

Ratio	Formula	Critical value
Share of Total Debt to the Current Budget Balance (TDCBB)	Total Debt / (Current Income - Consolidated Current Expenses + Interest Paid) * 12	72 ≥ TDCBB > 36 (months)
Share of Debt Service to Debt Capacity (DSDC)	(Interest paid + Repayments of bonds issued + surplus between repayments of short-term borrowed funds + surplus repayments of long-term borrowed funds and long-term borrowed funds) / (Current incomes - Consolidated current expenditure + Interest paid)	0.8 ≥ DSDC > 0.4
Share of Interest Paid to Debt Capacity (IPDC)	Interest paid / (Current incomes - Consolidated current expenses + Interest paid)	0.08 ≥ IPDC > 0.04
Share of External Financial Sources on Total Assets (EFSTA)	External Financial Sources / Total Assets or External Financial Sources / (Fixed Assets + Current Assets)	0.25 ≥ EFSTA ≥ 0.1
Share of External Financial Sources without Subsidies on Total Assets (EFSSTA)	(External Financial Sources - Long-Term deposits for Transfers) / Total Assets or (External Financial Sources - Long-Term deposits for Transfers) / (Fixed Assets + Current Assets)	0.25 ≥ EFSSTA ≥ 0.1

Ratio	Formula	Critical value
Share of total Debt on External Financial Sources (DEFS)	Total Debt / External Financial Sources	0.1 ≥ DEFS ≥ 0.0
Debt Service in Total (DST)	Total Debts / Total Consolidated Income	0.3 ≥ DST> 0.2
Share of Total Debt on Current Earnings (TDCE)	Total Debts / Current Incomes or Total debts / (Tax revenues + Non-tax revenues + Non-investment transfers received)	0.4 ≥ TDCE > 0.25

Source: authors' elaboration

Indebtedness does not pose a more significant risk to long-term debt, but no further debt is recommended, and it is necessary to pay attention to the development of current expenditures when TDCBB value is so high. There is a risk for the long-term stability position, when an unexpected decline in current income or an increase in current expenditure could come, which is indicated by IPDC ratio.

Indicators evaluating the liquidity of the municipality

The ability to meet short-term and long-term commitments fundamentally affects financial stability and the overall financial situation of the municipality. The following three indicators were identified as key ratios (Table 3). A critical value is stricter then in case of companies to create a reserve for municipalities in respect of their legal form.

Table 3. Liquidity ratios

Ratio	Formula	Critical value
Current Ratio (CR)	Current assets / Current liabilities	5 ≥ CR> 1
Quick ratio (QR)	Current financial assets / current liabilities	1.75 ≥ QR> 1
Financial reserves (FR)	(Short-term financial assets + Long-term time deposits) / (Short-term payables + Long-term liabilities)	0.5 ≥ FR> 0.05

Source: authors' elaboration

4.2 Overall financial health evaluation: a case study

The proposed set of indicators is applicable to a wide range of community activities as it assesses budget management, indebtedness and liquidity. The advantage is that the calculation of the indicators is based on the data from the obligatory published documents (municipal budget, FIN report 2-12 - statement for evaluation of the budget implementation of the budget, balance sheet, profit and loss account) and the municipalities will not be burdened by another administration to publish and calculate those indicators.

An overall evaluation was made to demonstrate importance to monitor a set of indicators on individual (municipal) basis. A simple statistical description was made for the set of 300 municipalities in time series 2010-2016.

An evaluation scale [2(1,0,-1)-2] was made for simplifying results interpretation, when:

- 2 points means that value exceed maximum of a critical value;
- 1 point means that value is near the maximum of a critical value;
- 0 points means that value is in the middle of a critical value;
- -1 point means that value is near the minimum of a critical value;
- -2 point means that value exceed the minimum of a critical value.

Budget management ratios

Simple description showed us that there are existing significant differences in BB, RTCE ratio due to extreme values of variance coefficient (403 % and 437%). It could be a signal for further study to divide municipalities by the location or by the size. Many above-average values have municipalities in ratios BB and ORTR. Following that other have many below-average values because of skewness value. Most of indicators are leptokurtic with many extreme values. It is very interesting that only three indicators (BB, CBSCE, ORTR) are statistically significant (α=0.05).

Table 4. General budget management ratios

Ratio	Mean	Median	Std.deviation	Variance	Curtosis	Skewness	Variation coefficient	Variation range	P-value 95%	Scale
BB	**0.055**	**0.067**	**0.220**	**0.048**	**7.177**	**-1.384**	**403%**	**2.005**	**0.021**	**0**
CBSCE	**0.260**	**0.251**	**0.169**	**0.029**	**7.636**	**0.738**	**65%**	**1.607**	**0.015**	**2**
BFACCE	8.490	5.232	13.593	184.763	44.744	4.918	160%	148.439	1.799	2
BFACCI	0.471	0.324	0.583	0.340	38.142	4.859	124%	5.593	0.066	2
TCECE	1.164	1.046	0.529	0.280	31.374	4.482	45%	5.722	0.060	1
RTCE	3.777	1.325	16.519	272.879	228.516	14.637	437%	271.559	1.950	2
ORTR	**0.804**	**0.834**	**0.139**	**0.019**	**2.265**	**-1.361**	**17%**	**0.753**	**0.016**	**1**
Total Score(B)	-	-	-	-	-	-	-	-	-	9

* statistically significant indicators are in bold

Source: authors' elaboration

Comparing values in the Table 4 with critical values in the Table 1, only three indicators (BB, TCECE and ORTR) met the criteria (being in the critical

interval). Budget balance in comparison with own revenues and expenditures are in balance so it is possible to evaluate them as stable, in general.

Municipality's indebtedness

This part shoved us very critical point of analysis, when every indicator has variation coefficient above 100%. Only two indicators (TDCBB, DSDC) seems to be not statistically significant (α=0.05). The most of indicators have leptokurtic distribution with many extreme values.

Table 5. General municipality's indebtedness

Ratio	Mean	Median	Std.deviation	Variance	Curtosis	Skewness	Variation coefficient	Variation range	P-value 95%	Scale
TDCBB	13.437	1.931	34.340	1179.215	123.718	9.041	256%	582.206	3.908	-2
DSDC	0.254	0.006	1.448	2.098	131.428	9.307	570%	24.690	0.165	-2
IPDC	**0.021**	**0.003**	**0.128**	**0.016**	**270.747**	**16.107**	**598%**	**2.173**	**0.015**	-2
EFSTA	**0.080**	**0.052**	**0.085**	**0.007**	**16.955**	**3.026**	**106%**	**0.782**	**0.010**	-1
EFSSTA	**0.073**	**0.047**	**0.080**	**0.006**	**5.393**	**1.990**	**111%**	**0.463**	**0.006**	-1
DEFS	**0.317**	**0.221**	**0.330**	**0.109**	**-1.396**	**0.437**	**104%**	**0.971**	**0.038**	2
DST	**0.165**	**0.053**	**0.264**	**0.070**	**5.510**	**2.274**	**160%**	**1.595**	**0.028**	-2
TDCE	**0.217**	**0.080**	**0.341**	**0.116**	**4.405**	**1.989**	**157%**	**2.042**	**0.031**	-2
Total (I)	-	-	-	-	-	-	-	-	-	-10

* statistically significant indicators are in bold

Source: authors' elaboration

Total score (Table 5 to Table 2) is so low, when most of values are near minimum value or below. It is the signal that indebtedness is very low, only DEFS indicator is out of all presented values. In that case negative values in scale present a good condition of municipalities.

Liquidity ratios

Those ratios illustrated that municipalities have a huge amount of financial resources to be used in case of emergency (Compare Table 6 and Table 3).

Table 6. General liquidity ratios

Ratio	Mean	Median	Std.deviation	Variance	Curtosis	Skewness	Variation coefficient	Variation range	P-value 95%	Scale
CR	8.628	4.985	11.350	128.832	21.599	4.179	132%	93.631	1.268	2
QR	6.679	3.498	10.560	111.505	27.177	4.731	158%	88.078	1.106	2
FR	4.683	1.238	10.135	102.722	39.806	5.616	216%	93.845	0.946	2
Total (L)	-	-	-	-	-	-	-	-	-	6

* statistically significant indicators are in bold

Source: authors' elaboration

To sum up results from Tables 4 to 6 we tested to create an index, weighted by the number of indicators to follow the methodology of Opluštilová (2012), when each total score was weighted and evaluated separately.

Table 7. Final evaluation

Score	No. of indicators	Weight	Value	Weighted score	Comment
B	7	0.389	9	3.501	Very Good
I	8	0.444	-10	-4.44	Low Debts
L	3	0.167	6	1.002	Average
Σ	18	1.00			Average

Source: authors' elaboration

For this set of indicators, data collection was already collected for the calculation of indicators for all MSR municipalities from secondary sources, the missing data were supplemented by primary research. The final form of the indicator system will be available for free on the MSR website (access expected in 2019), where the values of all indicators (with the possibility of filtering) for each MSR municipality will be calculated and graphically displayed with recommended values and explaining. This will include evaluation and recommendations in relation to the financial health within basic legal requirements regarding budgetary discipline and other community activities

5. CONCLUSIONS

Municipalities must treat citizens equitably with regard to the provision of services and citizens needs to be informed about financial situation in their municipality. This analysis identified main weaknesses of financial health of municipalities. It seems that will be necessarybto provide measured by our

indicator with two commonly used examples of socioeconomic variables: Population size and Location or municipality type as being made by McDonald (2017), Bird (2015), and Jacob and Hendrick (2013). In respect to Jones and Walker (2007) and Hendrick (2004), we confirmed that subjective or expert assignment of values to the ratios according to selected parameters or using arbitrary weights are the current problems in building global indicators of financial health, so more sophisticated method of critical values calculation will be used.

ACKNOWLEDGEMENTS

The article was financially supported within the project "Creating methodology and tools for monitoring the financial health of municipalities" within the grant program of the Moravian-Silesian Region, Nr. 02027/2017/FIN.

References

1) Berne, R. and Schramm, R. (1986). *The Financial Analysis of Governments.* Englewood Cliffs. NJ: Prentice Hall.
2) Bird, R.M. (2015). Reflections on measuring urban fiscal health. In: R.M. Bird and E. Slack, eds., *Is Your City Healthy? Measuring Urban Fiscal Health,* 1st ed.Toronto: Canada, pp. 11-42.
3) Brown, K.W. (1993). The 10-point test of financial condition: Toward and easy-to-use assessment tool for smaller cities. *Government Finance Review*, 9(6), pp. 21–26.
4) Cabaleiro, R., Buch, E. and Vaamonde, A. (2013). Developing a Method to Assessing the Municipal Financial Health. *The American Review of Public Administration*, 43(6), pp. 729-751.
5) CEMR - Council of European Municipalities and Regions, (2015). *Reviving local public investments.* [online] Available at: http://www.ccre.org/img/uploads/piecesjointe/filename/CEMR_position_paper_local_finances_final_EN [Accessed 09.02.2018].
6) Clark, B.Y. (2015). Evaluating the Validity and Reliability of the Financial Condition Index for Local Governments. *Public Budgeting and Finance*, 35(2), pp. 66–88.
7) CRIF-CCB, (2017). *iRating.* [online] Available at: http://www.informaceoobcich.cz/obce-loni-hospodarily-prebytkem-27-miliard-korun-za-rekordnim-prebytkem-stoji-vyrazny-pokles-investic/ [Accessed 12.03.2018].
8) Fitch (2016). *International rating methodology for local and regional governments.* [online] Available at: https://www.fitchratings.com/site/re/878660 [Accessed 19.01.2018].
9) Gorina, E., Maher, C. and Joffe, M. (2018). Local fiscal distress: measurement and prediction. *Public Budgeting and Finance*, 38(1), pp. 72–94.
10) Groves, S. M., Godsey, W. M. and Shulman, M. A. (1981). Financial indicators for local government. *Public Budgeting and Finance*, 1(2), pp. 5-19.

11) Hendrick, R. M. (2004). Assessing and Measuring the Fiscal Heath of Local Governments Focus on Chicago Suburban Municipalities. *Urban Affairs Review*, 40(1), pp. 78-114.
12) Jacob, B. and Hendrick, R. (2013). Measuring and predicting local government fiscal stress: Theory and practice. In: H. Levine, J.B. Justice and E.A. Scorsone, eds., *Handbook of Local Government Fiscal Health*. Burlington, MA: Jones and Bartlett Learning, pp. 11-41.
13) Jones, S. and Walker, G. (2007). Explanators of local government distress. *Abacus*, 43(3), pp. 396-418.
14) McDonald, B.D. (2017). *Measuring the fiscal health of municipalities*. Working Paper No. WP17BM1, Lincoln Institute of Land Policy, Cambridge, MA.
15) MF ČR, (2017a). *Ukazatele SIMU*. [online] Available at: http://www.mfcr.cz/cs/verejny-sektor/uzemni-rozpocty/monitoring-hospodareni-obci [Accessed 25.02.2018].
16) MF ČR, (2017b). *Zadluženost územních rozpočtů v roce 2016*. [online] Available at: https://www.mfcr.cz/cs/verejny-sektor/uzemni-rozpocty/zadluzenost-uzemnich-rozpoctu/2016/zadluzenost-uzemnich-rozpoctu-v-roce-201-30092 [Accessed 25.02.2018].
17) Moody's, (2013). *Regional an local governments outside the US*. [online] Available at: https://www.moodys.com/researchdocumentcontentpage.aspx?docid=PBC_147779 [Accessed 05.12.2017].
18) Opluštilová, I. (2012). *Finanční zdraví obcí a jeho regionální diferenciace*. Disertační práce. Brno: Masarykova univerzita v Brně.
19) Padovani, E., Rossi, M., Orelli, F. and Levy, R. (2010). *The Use of Financial Indicators to Determine Financial Health of Italian Municipalities*. September 6, 2010. [online] Available at: http://dx.doi.org/10.2139/ssrn.1679128 [Accessed 09.12.2017].
20) Standard and Poors, (2010). *International public finance: Methodology and assumptions: Rating international local and regional governments*. [online] Available at: http://www.standardandpoors.com/ratings/criteria/en/us/?filtername=governments [Accessed 09.12.2017].
21) Tkáčová, A. and Konečný, P. (2017). Krajské mestá Slovenska a ich finančné zdravie. *Scientific papers of the University of Pardubice. Series D*, Faculty of Economics and Administration, 41(3/2017), pp. 193-205.
22) Wang, X., Dennis, L. and Tu, Y.S. (2007). Measuring financial condition: A study of U.S. states. *Public Budgeting and Finance*, 27(2), pp. 1–21.

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OVERVIEW ON FISCAL DECENTRALIZATION IN EUROPEAN UNION COUNTRIES

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Abstract
The architecture of fiscal decentralization in the European Union countries is diverse due different historical perspectives and different needs. The paper will try to provide an overall survey on the design of fiscal decentralization in the landscape of the 28th countries of European Union taking into account theoretical aspects and empirical evidences and to propose some policy recommendations to strengthen the fiscal role and performance of local governments in the EU countries. We estimate the analysis to offer us a new viewpoint on the architecture of fiscal decentralization in EU-28 with positive aspects that define sustainable local public finances, but also aspects that require new solutions and fiscal policy options. This research paper can be considered a useful viewpoint in understanding the complexity of financial decentralization, being an addition to the existing literature on the field of local public finances.
Keywords: *fiscal decentralization; local government; local budget; European Union countries.*
JEL Classification: H70, H71, H72, H79

1. INTRODUCTION

Fiscal decentralization is a complex subject, being continuously a controversial aspect of modern political debate and its architecture is fundamental to ensuring that local government authorities can deliver efficient public services and function successfully in meeting other fundamental responsibilities.

The architecture of fiscal decentralization in EU countries is diverse due different historical perspectives and different needs. Until now, there is no ideal architecture of fiscal decentralization, each country tend to evolve over time, trying to identify the best policies designed to implement process of decentralization. What is certain is that fiscal decentralization is a pertinent issue among economic policy-makers and, both developed and developing countries have proceed to

intensive reforms toward a system of higher degree of fiscal decentralization and implementation (Dollery and Robotti, 2008; OECD, 2002a; OECD, 2002b).

The paper is organised as follows: Section 2 is dedicated to theoretical aspects regarding fiscal decentralization; followed by Section 3 which regards results of the empirical study conducted in the European Union countries. A final section carries out some concluding remarks.

2. THE SUBJECT OF THE RESEARCH, METHODOLOGY AND FURTHER ARGUMENTS CONCERNING FISCAL DECENTRALIZATION

The scope of this study is to provide an overall survey on the architecture of fiscal decentralization in the landscape of the 28th countries of the European Union. The approach of the research paper, firstly, will be an overview of arguments concerning fiscal decentralization, and, secondly, will be combined the quantitative analysis, primarily based on processed data from EUROSTAT, OECD, Dexia – CEMR, with the analysis and monitoring of the involved qualitative issues. In the end, the results are interpreted being formulated some concluding remarks.

Fiscal decentralization theory is complex, identifying the aspects that justify both its functionality and aspects that think decentralization very prudent application. Generally, it refers to the devolution of taxing and spending powers from the control of central government authorities to government authorities at sub-national/local levels (regional, provincial, municipal, etc.) (Boschmann, 2009). In a research paper, Olson (1969) developed the principle of "fiscal equivalence" as the division of responsibilities among different levels of government, accepting thereby the idea to involve a degree of decentralization.

OECD (2002a) identified at least two strong arguments of fiscal decentralization. One of the arguments is generally accepted by literature and represents the rationale for the existence of decentralization; respectively decentralisation may lead to higher quality of public services. Another one are taxes levied by the different tiers may vary greatly from their expenditure levels, and citizens may be misled over the cost of the public services delivered.

In literature (Oates, 1972, 1991; Bahl, 1999; Groenewegen, 1990; Bodman *et al.,* 2009), arguments in favor of fiscal decentralization are seen in terms of three related concepts: firstly, efficient provision of output – "decentralization theorem" of Oates (1972, 1991); secondly, effective decision making – there is a real homogeneity of interests because only few people are involved in budgetary power, decision making powers being locally held (Bahl, 1999; Groenewegen, 1990), and thirdly, advanced innovation and experimentation provided by decentralization (Groenewegen, 1990).

On the other hand, counter arguments are developed on the hypothesis that decentralization leads to macro-instability, because local governments are not

empowered to manipulate cyclical aggregate economic movements, the counter-cyclical policies being a performance attribute of the central government (Prud'homme, 1995; Tanzi, 1995; Ter-Minassian, 1997).

A more decentralized system is designed on the principle of considerable power to mobilize resources of local, through taxing authorities accompanied by strong tax bases (Boschmann, 2009), and exclusive competences on service delivery.

2.1 The EU-28 realities of local government finance systems

Each EU country developed a specific national legal framework for fiscal decentralization, which, in general, consists local government regulation by Constitution (Austria, Germany, Bulgaria, Greece, Luxembourg, Portugal, Romania, Spain, Hungary, etc.); by codes (fiscal code in Romania, Germany, etc.), by law/act (tax law - e.g. Belgium; local public finances law, local public administration act, a decentralization law - e.g. Romania, etc.), or other elements of legal framework. The European legal framework for local autonomy, with relevant aspects of fiscal decentralization, is based on the European Charter of Local Self-Government (1985).

For all CEE countries and other countries (e.g. France), a general characteristic of the decentralization legislation was the transfer of responsibilities to local governments (exclusive, share and delegated responsibilities/competences), but the urgently needed reform of local taxation did not take place (United Cities and Local Governments, 2010).

Local government authorities of EU countries (EU-28) are invested with responsibilities for a range of service delivery and with other key functions/ competences, all of them established by legal framework of each country. These responsibilities established by local and national legal framework takes into account their relevance for localities and their suitability for local implementation. In most EU countries, the first local governmental tier (municipalities) has exclusive competence in respect of rural development and urban planning (except Greece Luxembourg, Portugal), water and sewage/sanitation (except Italy, the Netherlands) household waste (except Greece, Ireland), social services (excluding France), sports (except the Czech Republic, Greece, Luxembourg), primary education, including the construction, operations and maintenance of schools. On the second local governmental tier, the local public structures have expertise in health, education, culture, roads and motorways, and economic development. In countries where there is third tier of local government, local government structures have competence in terms of education, roads, culture and economic development. We find that majority of EU states that exercise shared competences in education and health sector presents a reflection of democratic states, where the great social responsibility must be addressed in a national context. Also notice that an area of national importance such as defense is a responsibility that

requires central government involvement in any EU country, impossible to be regulated as an exclusive competence of local authorities.

There is also general agreement in EU countries that local governments have the possibility of consistent and predictable own resources with a degree of discretionary control and sufficient expenditure autonomy to respond to local responsibilities and local citizen needs. Local own revenues may take the form of taxes on appropriate bases or may take the form of non-tax revenues (e.g. fees and charges, license and registration fees, etc). Thus, the sources of own local revenue in EU countries are, in general, as following (i) real property tax, (ii) licences and fees that can be levied and collected by local public administration, in particular market fees and taxes and (iii) other fees for different services (water and sewage, electricity).

The majority of EU countries do not have sufficient own revenues on local budget and usually a part of local resources is often derived from shared taxes and intergovernmental transfers. For a larger autonomy, it is preferable that transfers to be unconditional rather conditional (but may vary in different contexts), and they may be used for capital spending rather recurrent expenditure. In majority of EU countries, transfers are based on a strict formula, with specified criteria, such as surface area, population size, poverty levels, local fiscal effort and others. Rules of transfer systems are transparent, being in accord with performance-based decentralization.

Loan financing (including bonds) in EU countries is, in general, regulated by the central authorities (Dexia – CEMR, 2012), regarding a certification process of the conditions for any bond issues and the debt limits (established by the law) as prudential rules: the "golden rule" for local government authorities (Austria, Belgium, Bulgaria, France, Latvia, Luxembourg, etc); prior approval by the oversight public authority for borrowing (Latvia, Slovenia); "Constitutionalisation" of local debt limits (Hungary); debt limits (lowering debt limits - Portugal; change in calculation methods for debt ratios that seek to lower it - Poland; definition of debt/GDP ratio for the local sector - Slovenia); reinforcement of local debt controls (Slovakia) and more broadly on the local financial management (Czech Republic); establishing additional prudential rules or "best practices" charters (Italy, Spain, France); temporary borrowing freeze (Spain) or volume limits on borrowing (Latvia); implementation or reinforcement of sanctions when debt ceilings are overrun (Slovakia, Spain). Loan and bond financing are viable options for sustainable local governments, but not all local public authorities are in this situation.

In the European Union countries (EU-28), while the "traditional" countries (EU-15) have robust local public finance systems with strong development in time, the EU countries which have experienced democracy starting with 1990, have taken important steps to develop local finance public systems in recent years, the process being unfinished. Even the countries with an "old" local

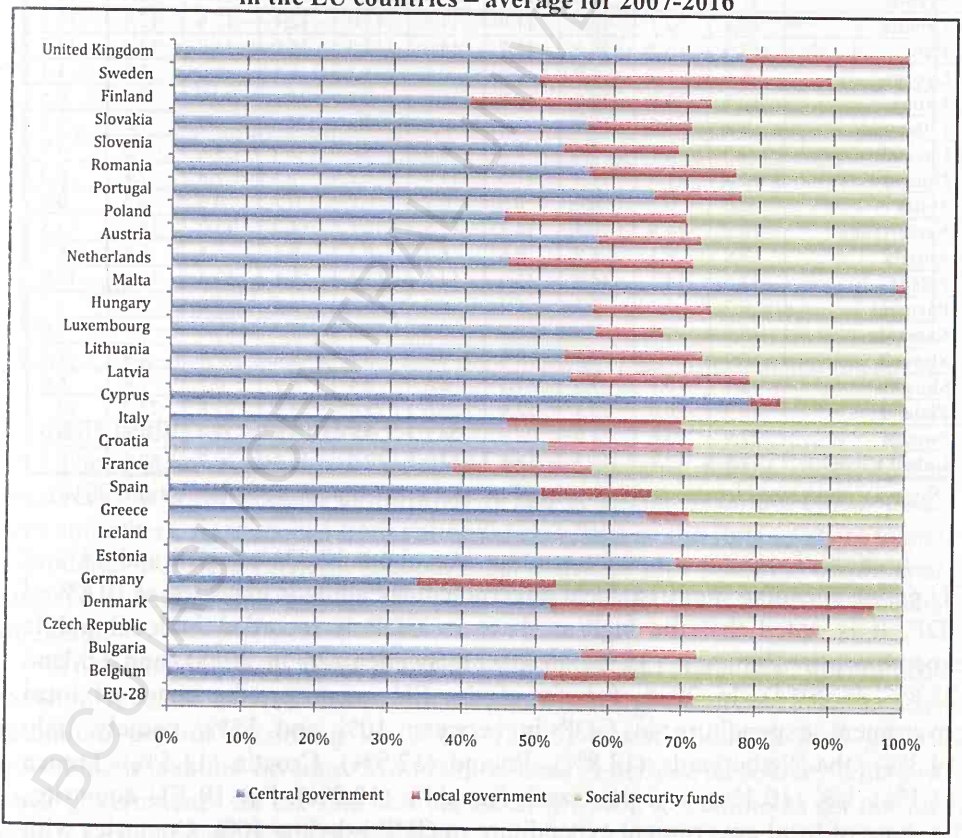
finance public system, but more the "new" local finance public systems must face to various challenges.

The elements of fiscal decentralization are the system of expenditures, the system of revenues, local budgets and local financial administration. Using both local expenditures and local revenues, we tap into the main aspects of fiscal decentralization.

2.2 The reality of expenditures in EU-28

According to fiscal federalism theories, visualizing local spending as share of total consolidated general government expenditure is the best way to gauge fiscal decentralization. Nowadays, the most widely used measure of fiscal decentralization is provided by the IMF's Government Finance Statistics (GFS) (IMF, 2015) and refers to expenditure or revenue share of local governments in total consolidated general government expenditures or revenues or as a proportion of GDP.

Figure 1. Distribution of public expenditure in the budgetary system in the EU countries – average for 2007-2016



Source: computed by authors processing data of Eurostat (European Commission, 2018)

The centre of gravity of local public expenditure tends to move to local budget in Denmark, Sweden and Finland (Figure 1).

Local public expenditures correlated with GDP offers a diversified image of EU countries (Table 1).

Table 1. Local government expenditures as % of GDP over the period 2007-2016

GEO/TIME	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016
EU-28	11.0	11.3	12.1	11.9	11.6	11.6	11.4	11.2	11.0	10.8
Belgium	6.7	6.8	7.4	7.2	7.4	7.6	7.6	7.4	7.2	7.1
Bulgaria	6.4	7.1	8.2	7.2	6.6	6.6	7.9	9.0	10.4	6.9
Czech Republic	11.4	11.6	12.9	12.7	12.3	11.3	11.4	11.5	11.3	10.2
Denmark	31.3	32.1	35.8	35.8	35.6	35.9	35.5	35.3	34.9	34.8
Germany	7.1	7.3	7.9	7.9	7.7	7.6	7.7	7.8	7.8	8.0
Estonia	9.4	10.8	11.2	9.8	9.3	9.7	9.9	9.3	9.4	9.4
Ireland	6.6	7.0	6.2	5.4	4.8	4.2	3.6	2.8	2.2	2.0
Greece	3.4	3.6	4.1	3.8	3.1	3.3	3.6	3.3	3.5	3.5
Spain	6.4	6.5	7.1	7.1	6.8	5.9	5.9	6.1	6.0	5.8
France	11.0	11.2	11.9	11.5	11.4	11.7	11.9	11.8	11.4	11.1
Croatia	12.1	12.1	12.5	11.9	11.5	12.0	12.1	12.6	12.1	11.5
Italy	14.6	15.1	16.5	15.7	14.9	14.9	15.0	14.7	14.5	14.3
Cyprus	1.8	1.7	1.9	2.0	2.1	1.8	1.5	1.6	1.6	1.4
Latvia	10.3	11.8	12.6	12.0	10.8	9.9	10.1	10.0	9.3	9.5
Lithuania	8.2	9.2	10.7	11.1	10.0	9.3	8.3	7.9	7.8	7.8
Luxembourg	4.7	4.9	5.6	5.2	5.0	5.0	5.0	4.8	4.5	4.9
Hungary	11.6	11.3	11.9	12.5	11.4	9.2	7.5	7.8	7.8	6.0
Malta	0.6	0.5	0.6	0.6	0.7	0.8	0.7	0.6	0.5	0.4
Netherlands	14.5	14.8	16.4	16.2	15.5	15.1	14.2	13.9	14.3	13.8
Austria	7.8	8.1	8.7	8.6	8.2	8.3	8.5	8.5	8.6	8.5
Poland	13.3	14.1	14.5	15.0	14.0	13.3	13.1	13.3	12.8	12.9
Portugal	6.7	7.1	7.5	7.4	6.8	6.2	6.6	6.0	5.9	5.7
Romania	9.5	9.5	9.6	9.6	10.3	9.6	9.2	9.0	9.7	9.0
Slovenia	8.3	9.0	9.8	9.8	9.4	9.5	9.7	9.8	8.9	8.2
Slovakia	6.1	6.1	7.3	7.3	6.8	6.4	6.4	6.7	7.4	6.6
Finland	18.9	20.0	22.3	22.4	22.6	23.4	23.8	23.8	23.2	22.6
Sweden	22.9	23.6	24.9	23.9	24.2	24.7	25.0	24.9	24.6	25.0
United Kingdom	11.8	12.4	13.3	13.1	12.3	12.6	11.2	10.7	10.5	10.1

Source: computed by the authors using Eurostat data (European Commission, 2018)

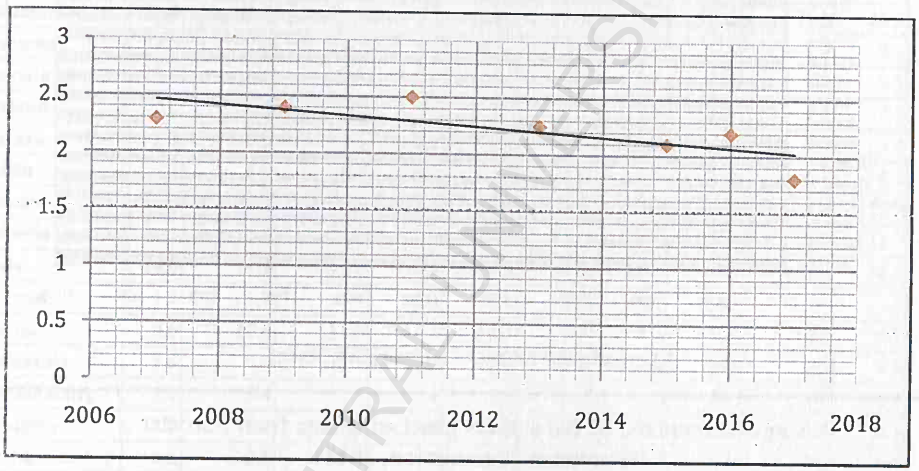
In 2009, local government spending was about 12.1% of GDP and 34% of EU public spending. In 2016, local government spending is expected at 10,8% of GDP. It is noted that the highest share in GDP is recorded in local public expenditure in Denmark (35.9% in 2012), Sweden (25 in 2015), and Finland (23.8% in 2014). In 2016, for six of the EU countries, the share of local government expenditure in GDP is between 10% and 15%, namely Italy (14.3%), the Netherlands (13.8%), Poland (12.9%), Croatia (11.5%), France (11.1%), UK (10.1%), and the Czech Republic (10.2%). For 19 EU countries, the share of local government expenditure in GDP is below 10%. Countries with a small territory have a very low share (Malta - 0.4%, Cyprus - 1.4%), due to the

fact that these countries are centralized precisely because of the size of the country.

Between 2007 and 2016, the share of spending by subnational governments in GDP has increased in several countries.

The amount of expenditure alone is not enough to characterize financial autonomy. Functional independence also depends on how much discretion a local authority has to allocate and commit its expenditures, and to manage its resources. Local authority on capital expenditure as a percentage of GDP helps to show the role played by local authorities with respect to the flow of capital investment (Figure 2).

Figure 2. Local public investment as percentage of GDP in EU countries



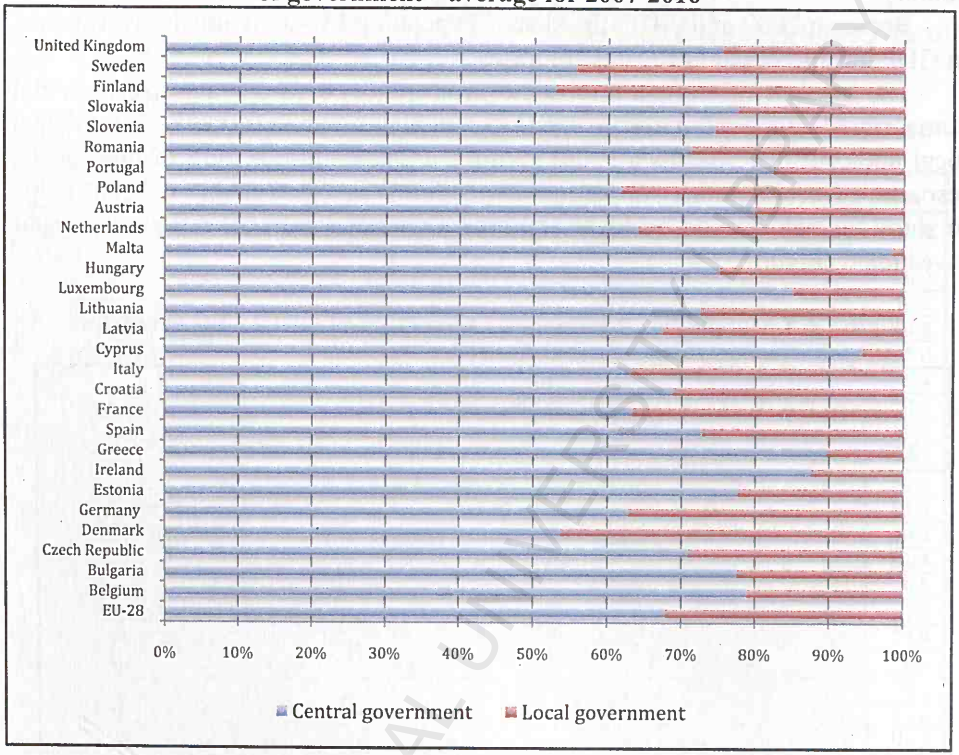
Source: computed by authors using data from Eurostat (European Commission, 2018)

2.3 The reality of revenues in EU-28

The system of revenues is defined by the existing means of generating resources for local budget, as follows: i) self-generated revenues (local taxes, fees and other), ii) revenues from national taxes (part of the state or share taxes), iii) budget transfers (general/unconditional transfers and specific/ conditional/ targeted subsidies and grants), iv) other means (raise funds through financial markets).

The commonly way to see revenue decentralization is total local governments taxation revenue derived from sources where local governments have at least minimum control according to OECD (2005) classification to total general government taxation revenue. Minimum control is defined as sources where (a) local governments set tax rate and tax base; (b) local governments set tax rate only (c) local governments set tax base.

Figure 3. Distribution of general government revenues across levels of government – average for 2007-2016



Source: computed by the authors processing data from Eurostat (European Commission, 2018)

Sweden, Denmark and Finland are countries which accord high importance to the ability of local government authorities to raise a high proportion of their revenue locally and to equalization, and, in 2016, revenue of local budget accounted approximately 60% of total revenue of consolidate general budget. As a rule, in Sweden additional funding is transferred to the poorest municipalities. Grants and subsidies remain the main source of local budgets in Greece, Slovakia, Ireland, etc.

Correlating with GDP, local public revenue of the EU countries accounted for approximately 11.2% of GDP and 35% of public revenue, in 2016 (Table 2).

Denmark accounted 35.2% of GDP in 2016, followed by Sweden (24.5%) and Finland (22.2%). For six of the EU countries, the share of local government revenues to GDP is between 10% and 15% respectively in Czech Republic (11.2%), France (11.3%), Croatia (11.7%), Italy (14.5%), the Netherlands (13.9%), and Poland (13.1%). For 19th states of the EU, the share of local government revenue to GDP is below 10%. It is notable that states below 3% of

GDP, we find only fairly small countries maintaining a certain financial centralization (Malta - 0.4%, Cyprus - 1.5%), along with the federal states and states with autonomous regions.

Table 2. Local government revenues as % of GDP over the period 2007-2016

GEO/ TIME	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016
EU-28	10.9	11.0	11.7	11.6	11.4	11.5	11.3	11.2	11.1	10.9
Belgium	6.8	7.1	7.3	7.1	7.2	7.1	7.3	7.3	7.2	7.3
Bulgaria	6.3	6.7	7.4	7.2	6.6	6.8	8.3	8.9	9.5	7.0
Czech Republic	11.7	11.5	12.3	12.3	12.0	11.2	11.7	11.7	11.8	11.2
Denmark	31.3	31.9	35.2	35.7	35.7	35.9	35.8	35.5	35.2	35.2
Germany	7.5	7.6	7.7	7.5	7.7	7.6	7.8	7.7	7.9	8.1
Estonia	9.0	10.1	10.8	10.0	9.4	9.5	9.4	9.2	9.7	9.5
Ireland	6.4	6.6	6.1	5.4	4.7	4.2	3.6	2.9	2.4	2.2
Greece	3.4	3.6	4.1	3.5	3.3	3.6	4.0	3.6	3.7	3.8
Spain	6.1	6.0	6.5	6.4	6.0	6.2	6.5	6.6	6.5	6.4
France	10.6	10.7	11.6	11.4	11.4	11.5	11.5	11.6	11.4	11.3
Croatia	12.1	12.0	11.9	12.4	11.6	12.0	12.1	12.6	12.1	11.7
Italy	14.6	14.9	16.1	15.3	14.8	15.1	14.9	14.8	15.0	14.5
Cyprus	1.7	1.7	1.9	2.0	2.1	1.8	1.7	1.6	1.6	1.5
Latvia	9.6	10.6	11.0	11.7	10.3	9.7	9.7	9.8	9.7	9.7
Lithuania	7.8	9.0	10.3	11.2	9.6	9.1	8.0	8.0	8.2	8.3
Luxembourg	5.0	5.4	5.5	5.4	5.3	5.5	5.4	5.1	4.9	5.2
Hungary	11.5	11.4	11.5	11.6	12.0	9.7	9.9	9.1	8.0	6.3
Malta	0.6	0.5	0.6	0.7	0.7	0.7	0.7	0.6	0.6	0.4
Netherlands	14.1	14.1	15.5	15.1	14.9	14.6	13.8	13.6	14.1	13.9
Austria	7.7	8.0	8.3	8.2	8.1	8.2	8.4	8.5	8.5	8.4
Poland	13.3	13.9	13.4	13.7	13.3	13.0	13.0	13.1	12.8	13.1
Portugal	6.4	6.5	6.7	6.6	6.7	6.7	6.8	6.3	6.3	6.1
Romania	9.2	8.4	8.9	9.5	9.7	9.1	9.3	9.5	10.4	9.2
Slovenia	8.2	8.4	9.3	9.6	9.4	9.6	9.5	9.7	9.2	8.4
Slovakia	6.0	6.1	6.6	6.4	6.6	6.5	6.6	6.6	7.6	7.1
Finland	18.8	19.6	21.7	22.2	22.0	22.3	23.1	23.1	22.5	22.2
Sweden	23.0	23.5	24.6	24.1	23.8	24.5	24.9	24.5	24.2	24.5
United Kingdom	11.6	12.1	12.8	12.9	12.1	12.2	11.0	10.8	10.5	9.7

Source: computed by authors using Eurostat data (European Commission, 2018)

Over the period 2007-2016, the largest increases in local government revenue to GDP were recorded in Denmark, Finland and Sweden. EU countries with high tax burden during the crisis, such as Slovenia and Greece also

recorded increases during the same period, while Ireland and Hungary registered decreases of major local public revenues

3. CONCLUDING REMARKS

One significant finding of this study is that expenditure decentralisation (local public expenditures as share of total consolidated general government expenditures), own revenue decentralization and local responsibility to cover their expenditures with their own revenues (tax revenues and fees) tend to go hand-in-hand across the EU-28 countries.

The second important issue is that the results of the analysis emphasized the general tendency of the EU-28 countries to develop a direct and positive relationship between fiscal decentralization and local economic growth. This aspect is identified in each country and at European Union level being developed various relevant studies and an appropriate legal framework.

The third important issue is that the results of the analysis emphasized richer European Union countries tend to be more decentralized, and democracy is positively and greatly correlated with decentralization.

In our opinion the three shifts will be important for the architecture of fiscal decentralization in the EU countries: i) Make fiscal decentralization the goal of local development policy and align national fiscal policies accordingly; ii) Design new policy objectives for fiscal decentralization to be congruent with the real situation in many local governments with limited tax bases and limited revenue raising potential; iii) Create an effective legal framework to increase the tax base, tax yields and collection capacity at the local and central levels; and iv) Clarify local government expenditure responsibilities through the well-developed methodologies and practices for translating expenditure assignment responsibilities into quantifiable resource needs.

As future research direction we intend to extend the analysis at local governments at different levels, by evaluating the architecture of local governments of different developed and developing countries.

References

1) Bahl, R.W. (1999). Implementation rules for fiscal decentralization. *International Studies Program Working Paper 991(1),* Andrew Young School of Policy Studies, pp.1-30.
2) Bodman, P., Campbell, H., Heaton, K.A. and Hodge, A., (2009). *Fiscal Decentralisation, Macroeconomic Conditions and Economic Growth in Australia.* Macroeconomic Research Group, version June 2009. [online] Available at: http://www.uq.edu.au/economics/mrg/2609.pdf [Accessed 13.04.2018].
3) Boschmann, N. (2009). *Fiscal Decentralization and Options for Donor Harmonisation.* Berlin: Development Partners Working Group on Local Governance and Decentralization (DPWG-LGD).

4) Dexia - CEMR, (2012). *Subnational public finance in the European Union,* 11th ed. Dexia - CEMR Publisher.
5) Dollery, B. and Robotti, L. (2008). *The theory and practise of local government reform*. Cheltenham: Edward Elgar.
6) European Commission, (2018). *EUROSTAT.* [online] Available at: http://ec.europa.eu/eurostat/data/database [Accessed 03.04.2018].
7) Groenewegen, P. (1990). *Public Finance in Australia: Theory and Practice*, 3rd ed. New Jersey: Prentice Hall.
8) IMF, (2015). *Government Finance Statistics*. [online] Washington D.C.: International Monetary Fund. Available at: http://www.imf.org/en/Data [Accessed 03.04.2018].
9) Oates, E.W. (1972). *Fiscal Federalism*. New York: Harcourt Brace Jovanovich, Inc.
10) Oates, E.W. (ed.) (1991). *Studies in Fiscal Federalism*. Vermont: Edward Elgar Publishing Limited.
11) OECD, (2002a). *Fiscal decentralization in EU applicant states and selected EU member states*. OECD Centre for tax policies and administration, Paris.
12) OECD, (2002b). Fiscal design surveys across levels of government. *OECD Tax Policy Studies no. 7,* Paris.
13) OECD, (2005). Fiscal autonomy of sub-central governments. *OECD Network on Fiscal Relations across Levels of Government Working Paper No. 2.*
14) Olson, M. (1969). The Principle of "Fiscal equivalence": The Division of Responsibilities among Different Levels of Government. *American Economic Review*, 59(2), pp. 479-487.
15) Prud'homme, R. (1995). On the dangers of decentralization. *World Bank Research Observer,* 10(2), pp. 210-226.
16) Tanzi, V. (1995). Fiscal federalism and decentralisation: a review of some efficiency and macroeconomic aspects. In: *Annual World Bank Conference on Development Economics 1995*, pp. 295-330.
17) Ter-Minassian, T. (ed.) (1997). *Fiscal Federalism in Theory and Practice.* Washington D.C.: International Monetary Fund.
18) United Cities and Local Governments, (2010). *Local Government Finance: The Challenges of the 21st Century*. Second Global Report on Decentralization and Local Democracy (GOLD II).

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THE ECONOMIC AND SOCIAL IMPACT OF ENTREPRENEURIAL ACTIVITY

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Abstract
The successful entrepreneurship is a component of sustainable development and it is a multidimensional phenomenon with positive impact on job creation but also an innovative process.
The entrepreneurial activity generates significant changes in product offers, new logistic processes and business models.
In this paper, we analyse the contribution of entrepreneurship to economic and social development by making reference to a set of indicators reflecting job creation, and also innovation in entrepreneurial activity.
Keywords: *impact; entrepreneurship; innovative process; job creation.*
JEL Classification: M13, M21, O30

1. INTRODUCTION

Researchers and practitioners in the field of entrepreneurial economy (Drucker, 1993; Fayolle, 2003; Watson, 1998; Timmons, 1999; Boldureanu *et al.*, 2013; Ghenea, 2011) have shown in their studies that entrepreneurship is a multi-dimensional phenomenon, with a positive impact on economic and social development.

Creating new businesses is a key element in the process of economic development and growth because: there is a positive relationship between the development rate of a country or region and its rate of entrepreneurial activity; it contributes to the economic growth by generating employment and the development of innovations. Internationally, support given to entrepreneurship has become a priority, lately being viewed as a solution for wealth accumulation of a nation, reduction of poverty and social inequality (Boldureanu, 2015).

Although the role of entrepreneurship for the economic performance of a country depends on the stage of its economic development (LêKhang and Thành, 2018).

There is a relation of mutual interconditionality between entrepreneurship and the innovative process shaped by the fact that innovation is a process of experimental learning, where organizations and individuals acquire new competencies for creating new products, processes, and business models.

(Boldureanu *et al.,* 2016). Also, the economic impact of the process of innovation is multiple: at national level, the innovative capacity is a key determinant of the economic competitiveness of nations; at the global level, innovation is the instrument for addressing the current global environmental and health challenges and at the level of organizations, innovation is the result of their capacity to generate new ideas, as it contributes to increased production, employment and the environmental protection (Diaconu, 2011, qtd in Boldureanu *et al.,* 2017).

Consequently, entrepreneurship has a positive impact on job creation, as well as on the innovative process; these aspects will be discussed in this study.

2. LITERATURE REVIEW

Rich literature has been generated in the last decades on the outcomes of entrepreneurship in terms of economic and social performance. Still, almost the entire literature has been focused on two types of observations – the company and the region. It is clear that there are few studies presenting the impact of entrepreneurship on its performance at country level (Carree and Thurik, 2003). Main studies on this line of research have been conducted by the Global Entrepreneurship Monitor, which made a huge effort to collect data at European and international level, and has provided relevant information on entrepreneurship, its impact at national level (Global Entrereneurship Monitor, 2018).

In their paper „The Effect of Entrepreneurial Activity on National Economic Growth" (Stel, Carree and Thurik, 2005), the authors state that even if entrepreneurship is an important factor of economic growth, most empirical studies have not included it as a key variable influencing the economic performance, most economists viewing entrepreneurship as being vital for economic progress. Starting from these viewpoints, the authors analyse the degree of influence of entrepreneurship for three groups of countries with different economies: highly developed economies, economies in transition and developing countries. The results show that entrepreneurial activities influence economic growth and it depends on the level of income per capita. It denotes that that entrepreneurship plays a different role on countries depending on their stage of economic development. Concerning the relation between entrepreneurship and GDP, Wong, Ho and Autio (2005) do not support the idea that higher levels of global entrepreneurship are associated with higher GDP growth rates.

In current economies, entrepreneurship has an important role as it has a significant impact on economic growth through innovation (Rodrigues, 2018). The new companies create jobs and contribute to the development, implementation and propagation of innovations thus positively impacting economic growth in general (Drucker, 1993 qtd in Boldureanu, 2015).

Schumpeter (1934) also contributed to the study of entrepreneurial behaviour. In accordance to Schumpeter, the idea of entrepreneurial behaviour

should be viewed as a key factor for stimulating economic development as an entrepreneurial activity lead to the process of creative destruction. Models of Schumpeterian type pay a special attention to the source of economic development (Wong, Ho and Autio, 2005 qtd in Rodrigues, 2018).

In what regards the social impact of entrepreneurship, studies (Lackéus, 2015) report that generally education, and especially the entrepreneurial one, plays an important role in encouraging people to get advantage of business opportunities and face the uncertainty specific to independent activities. Entrepreneurial education enables people to acquire competencies and skills needed to create a business, to improve their productivity, and as a result to obtain higher economic growth at national level (Rodrigues, 2018).

Therefore, entrepreneurial activities have a positive relation with economic growth, and their role on economic performance of a country depends on the stage of economic development of that country (LêKhang and Thành, 2018), and entrepreneurship is the driving force of economic growth when new enterprises more jobs, increase production and introduce innovations to economy.

3. MATERIAL AND METHOD

This study uses an inductive and a deductive approach by using critical and comparative investigation of numerous national and international studies. The aim of the study is to determine the economic and social impact of entrepreneurial activities, and its objectives are:

O1- to identify the impact of entrepreneurial activity on job creation;

O2- to determine and analyse the innovation of entrepreneurial activities.

To reach the aims and objectives of the study we have used databases and reports of the Global Entrepreneurship Monitor (GEM) and Global Report 2017/2018, respectively.

4. REZULTS AND DISCUSSIONS

To identify the importance of entrepreneurial activity, GEM suggests a set of ratios, relevant for reaching the aim and objectives of this study. The analysis is based on a survey applied to 54 economies at international level, grouped into three types of economies:

a) factor-driven economies;

b) efficiency-driven economies;

c) innovation-driven economies.

4.1 O1- Identification of the impact of entrepreneurial activity on job creation

New job creation is one of the main objectives of entrepreneurship, it is a key instrument for sustainable development, economic growth, poverty and social inequality reduction.

To identify the importance of entrepreneurship, GEM asked the entrepreneurs to disclose the number of their employees for the year 2017 (excluding the owners), and to forecast how many employees they will have in 5 years.

The difference between current and estimated employees indicates the expectations of jobs growth.

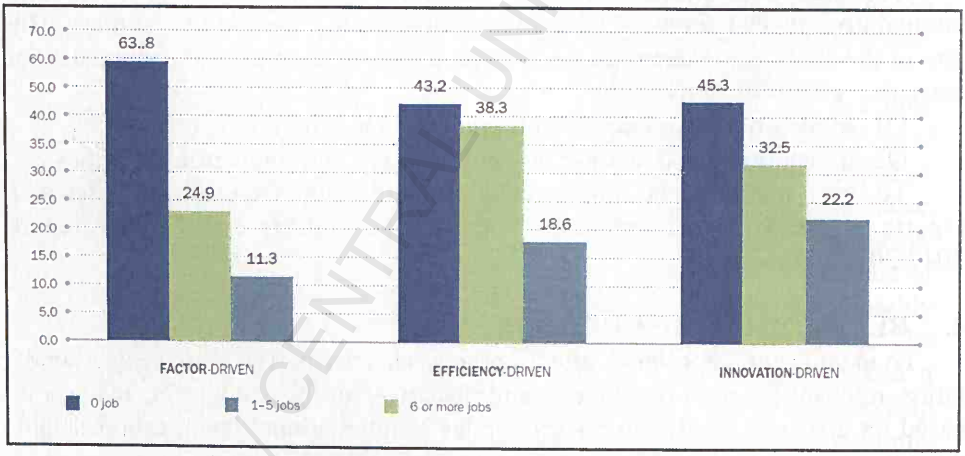
The results show that there are no differences in newly created jobs for 2017 compared to 2017. Of 54 economies included in the survey, 44 do not expect to create new jobs over the next 5 years, of which only 20% expect to create six or more jobs.

The results also underline that in the efficiency-driven economies there was a transfer from creating no jobs to 1 to 5 new jobs in the next 5 years, and in the innovation-driven economies, the results show the creation of six or more jobs.

This suggests that entrepreneurship plays a different role in countries depending on their stage of economic development.

Figure 1 presents the expectations regarding new job creation in 54 economies.

Figure 1. Development phase averages for employment expectations in the next five years (as % of TEA) in 54 economies, GEM 2017



Source: (Global Entrepreneurship Monitor, 2018, p. 39)

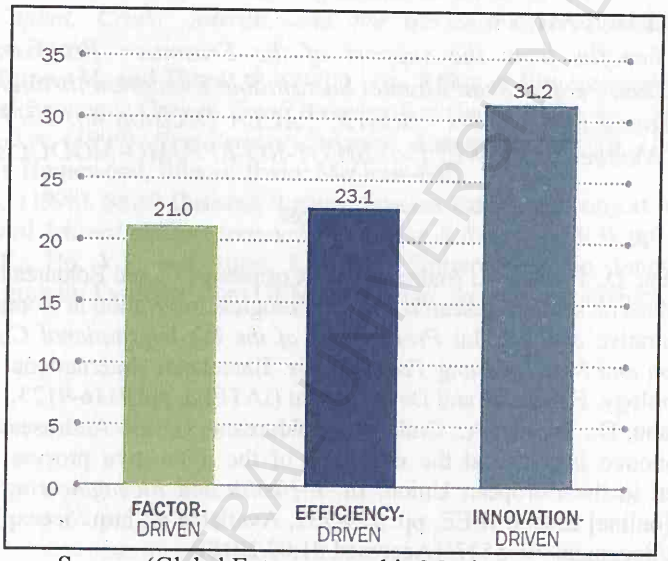
4.2 O2 – Determination and analysis of innovation of entrepreneurial activities

The concepts of innovation and entrepreneurship are closely linked, and are under a process of mutual interconditioning.

To identify innovation from entrepreneurial activities, GEM analysed the degree to which entrepreneurs introduce product, process, organizational and marketing innovation. According to GEM, more intense innovation activities lead to increased competitiveness, sustainable development and economic

growth measured in GDP per capita. Entrepreneurs in innovation-driven economies are much more innovative (31.2%), followed by the entrepreneurs of efficiency-driven economies (23.1%), and the ones from factor-driven economies (21.0%). Compared to 2016, the proportion of innovative entrepreneurs has remained unchanged. (Figure 2).

Figure 2. Development phase averages for innovation levels (percentage of TEA with product new to all and no competitors) in 54 economies, GEM 2017



Source: (Global Entrepreneurship Monitor, 2018, p. 40)

5. CONCLUSIONS

There are multiple consequences of entrepreneurship in terms of economic and social performance: from job creation and innovative process up to sustainable development and GDP growth per capita. Also, entrepreneurial education contributes to acquiring competences and skills needed for developing a business, and consequently having higher national economic growth.

The identification of economic and social impact of entrepreneurship was conducted using the analysis of Global Raport 2017/2018 carried out by GEM on 54 economies divided into three types: a) factor-driven economies; b) efficiency-driven economies; c) innovation-driven economies.

In what regards the identification of the impact of entrepreneurial activity on job creation, the results show that employment expectations, there were no differences in 2017 and 2016, respectively. Of 54 economies included in the survey, 44% do not expect to create jobs in the next five years, and only 20% of these expected to create six or more jobs.

Regarding the innovation from entrepreneurial activities, the entrepreneurs from innovation-driven economies are much more innovative (31.2%), followed by the entrepreneurs of efficiency-driven (23.1%) and factor-driven economies (21.0%). Compared to 2016, the proportion of innovative entrepreneurs remains unchanged.

Due to the importance and role of entrepreneurship in economy identified in this study, it remains a key factor, a driving face for economic and social development.

ACKNOWLEDGEMENT

This paper benefits from the support of the Erasmus+ Programme of the European Union, Project Jean Monnet Sustainable Education through European Studies for Young Researchers - SESYR, EACEA Decision no. 2017-1893/001-001, Project Number 587359-EPP-1-2017-1-RO-EPPJMO-MODULE.

References

1) Boldureanu, D., Prodan, A., Andruseac, G., Costuleanu, C. and Boldureanu, G. (2016). Perspectives on science, research and technological innovation in Romania and EU. A comparative analysis. In: *Proceedings of the 8th International Conference on Education and New Learning Technologies.* Barcelona: International Association of Technology, Education and Development (IATED), pp. 9116-9123.
2) Boldureanu, D., Prodan, A., Ciulu, R., Boldureanu, G. and Andruseac, G. (2017). The economic impact and the dynamics of the innovative process in Romania compared to the European Union. In: *E-Health and Bioengineering Conference (EHB).* [online] Sinaia: IEEE, pp. 729-732. Available at: http://ieeexplore.ieee.org /abstract/document/7995527/ [Accessed 01.07.2018].
3) Boldureanu, G. (2015). The Creation of New Businesses in Romania. *Ovidius University Annals. Economic Sciences Series,* 15(1), pp. 456-562.
4) Boldureanu, G., Lache, C., Păduraru, T., Boldureanu, D. and Niculescu, N. (2013). Students' entrepreneurial competencies and orientation. Current status and perspectives. *Environmental Engineering and Management Journal*, 12(11), pp. 2071-2077.
5) Carree, M. and Thurik, R. (2003). The Impact of Entrepreneurship on Economic Growth. In Z.J. Acs and D.B. Audretsch, eds., *Handbook of Entrepreneurship Research,* Great Britain: Kluwer Academic Publishers, pp. 437-471.
6) Diaconu, M. (2011). Technological innovation: concept, process, typology and economic implications. *Theoretical and Applied Economics*, 8(10), pp. 107-124.
7) Drucker, P. (1993). *Inovația și sistemul antreprenorial*. București: Enciclopedica Publishing House.
8) Fayolle, A. (2003). *Le metier du createur d'entreprise*. Paris: Edition d'Organisation.
9) Ghenea, M. (2011). *Antreprenoriat*. București: Universul Juridic.
10) Global Entrepreneurship Monitor (2018). *Global Report 2017/2018*. Available at: https://www.gemconsortium.org/ [Accessed 20.07.2018].
11) Lackéus, M. (2015). *Entrepreneurship in Education. What, Why, When, How. Entrepreneurship* 360 *Background Paper*. Paris: OECD. Available at:

https://www.oecd.org/cfe/leed/BGP_Entrepreneurship-in-Education.pdf [Accessed 21.07.2018].

12) LêKhang, T. and Thành, N. (2018). Economic Growth, Entrepreneurship, and Institution: Evidences in Emerging Countries. In: *The 5th IBSM International Conference on Business, Management and Accounting*. Hanoi, Vietnam: Hanoi University of Industry, pp. 357-374.
13) Rodrigues, R.D. (2018). *The Impact of (Opportunity and Necessity) Entreprenership of Economic Growth: does Human Capital Matter*?. Dissertation thesis. Faculdade di Economia, Universidade do Porto.
14) Schumpeter, J.A. (1934). *The Theory of Economic Development: An Inquiry into Profits, Capital, Credit, Interest, and the Business Cycle*. New Bunswick: Transaction Books.
15) Stel, A., Carree, M. and Thurik, R. (2005). The Effect of Entrepreneurial Activity on National Economic Growth. *Small Business Economics*, 24(3), pp. 311–321.
16) Timmons, J.A. (1999). *New Venture Creation: Entrepreneurial for 21st Century*. 5th edition. Homewood, Illinois, Irwin: McGraw-Hill.
17) Watson, K. (1998). Small Business startups: Success factors and support implication. *International Journal of Entrepreneurial Behavior & Research*, 4(3), pp. 217-233.
18) Wong, P.K., Ho, Y.P. and Autio, E. (2005). Entrepreneurship, innovation and economic growth: Evidence from GEM data. *Small Business Economics*, 24(3), pp. 335–350.

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ECONOMIC MODELS OF FINANCING HEALTH SERVICES IN THE EUROPEAN UNION

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Abstract
In most countries, governments decide on the percentage of GDP allocated to the healthcare system and the amount of population contribution, based on fundamental arguments, to cover the demands of the sector. These arguments can be multiple, related to ethics, history, political, economic, etc., which outline a general framework that analyzes the main economic considerations for designing healthcare funding. Although the universally binding health care right for a minimum uniform set of services can be guaranteed by the state, this is not a certainty, especially for people who do not have compulsory health insurance. Thus, the higher the minimum set of health services taken into account as the basis and the number of people who do not contribute to the mandatory national health insurance system, the higher the cost of services and, implicitly, the contributions of the contributing this sense. In an attempt to find a balance between accessibility and efficiency goals, a variety of sources of funding health care have emerged across the EU, combining state spending as a percentage of GDP, own spending, additional health insurance, and funding on a tax or social health basis.
Key Words: *economy; financing; health; services; models.*
JEL classification: A12, H5, H51

1. INTRODUCTION

The financing of a health system refers to the way the financial resources necessary for the activity of the sector are collected, as well as the manner in which these funds are distributed and then used. The way of financing combined with the type of organization of the healthcare system determines the categories

of persons who have access to health care, the cost of such care, productive efficiency and, last but not least, the quality of the services offered to the population.

To fund any healthcare system, it is necessary to collect financial resources from the population in order to contract the providers of medical services, in order to offer them later to the contributors. The primary objective of the systems is to spread the costs of medical services between people with disabilities and healthy people, depending on the resources of each and depending on the resources available to the state.

Access to health care should be seen as a right of the population and not as an opportunity. However, the funding system for this sector turns the right to care into the opportunity to receive medical assistance. Thus, the degree of access to the sector focuses on the availability of healthcare providers and care facilities, elements directly proportional to the availability of resources to pay for services. In other words, access to health services and thus the health of the population depends on financed the sector.

2. FINANCING HEALTH SERVICES

Total expenditure for the health sector should be roughly equal to the population's contributions, as not all people contributing to the system need healthcare. However, the cost of these services has risen in recent years at rates that go beyond income growth, and many analysts and policymakers see this as a prominent issue for many nations. The causes stem from the unhealthy lifestyle of some people and, on the other hand, from the lack of investment in prevention. The key factor in this is the reduced national income, which does not improve the lifestyle of individual each and also does not allow investment in a qualitative health system capable of covering all requests.

Since 1960, healthcare spending has doubled globally as a share of GDP. Thus, during the 1960s, countries that recorded average annual health care costs of 3.5% per capita between 1990 and 2001, the cost of these services grew by about 50%. The main causes are medical technology, human resources in the system, treatment, price inflation and the aging of the population. Some economists have voiced their opinion that a steady increase in health spending may be unsustainable, especially in light of current and projected budget deficits. In this regard, governments have sought appropriate solutions to finance the increase in health care costs, given the ever more constrained collective resources. Maintaining universal compulsory access to basic services, continuous improvement of technical efficiency and medical staff, low financial resources of the population, resulting in a less healthy lifestyle, as well as the dynamic character of this type of services, are factors contributes to the continued growth of the costs of this sector. (Paolucci, 2011, pp. 14– 15).

In the health services, the difficulties encountered by patients are divided into two categories, namely the availability of healthcare providers and the

existence of their own financial resources, in order to be able to benefit from continuous care. Access to financial resources is a critical element in the possibility of receiving healthcare because the lack of coverage of insurance translates into barriers to obtaining this type of service (Mullner, 2009, p. 18). Thus, World Health Statistics 2017 specifies that in 2016, within the EU, 42% of uninsured persons did not have access to medical care, only 9% of the insured reported that they do not have a family doctor or not they benefit from any facility when they need care because they are confronted with the existence of unofficial costs. Almost half, 47% of those who were not physically insured, had to delay their visit to the doctor because of the cost, compared with 15% of those who had medical insurance. (World Health Organization, 2017).

The way funds are collected for the health sector has an important impact on the objectives of funding, transparency and accountability policy. The collection process involves three elements: funding sources, contribution mechanisms used to collect funds and organizations responsible for fundraising. Individuals and businesses are the main sources of funding for health care, although some funds can be channeled through non-governmental organizations (NGOs) and multilateral agencies such as the World Bank (Thomson, Foubister and Mossialos, 2009, p. 26) (Table 1).

Table 1. The collection process: sources of finance, contribution mechanisms and collecting organizations in the European Union

Sources of finance	Contribution mechanisms	Collection organizations
Individuals, households and employees	*Public*	Central, regional or local government
Firms, corporate entities and employers	Direct and indirect taxes Compulsory insurance contributions (earmarked taxes)	Independent public body or social security agency (jointly, for all social benefi ts, or for health benefi ts alone)
Foreign and domestic Nongovernmental organizationsand charities	*Private*	Public insurance funds or private non-profit-making or profit-making insurance funds
Foreign governments and multilateral agencies	Private insurance premiums Private health insurance and medical savings accounts OOP payments (direct payments or cost sharing/ user charges)	

Source: (Thomson, Foubister and Mossialos, 2009, p. 27)

The contribution mechanisms to the health sector are divided into two categories, public and private. Public, tax and social insurance contributions are mandatory and reduce financial risks especially for people with health problems. From an economic point of view, this system improves efficiency by counteracting some of the uncertainties associated with financial risk, so we don't know whether or when we become ill, how serious the condition is, what will be the cost of care, and whether we will be able to pay for treatment. It is also of major importance that public contribution mechanisms are income-based and allow access to health care services based on need rather than on the ability to pay. Private contribution mechanisms are usually voluntary and may involve advance payments through private insurance contracts and health savings accounts. Private contribution mechanisms do not take account of people's ability to pay (Thomson, Foubister and Mossialos, 2009, p. 27).

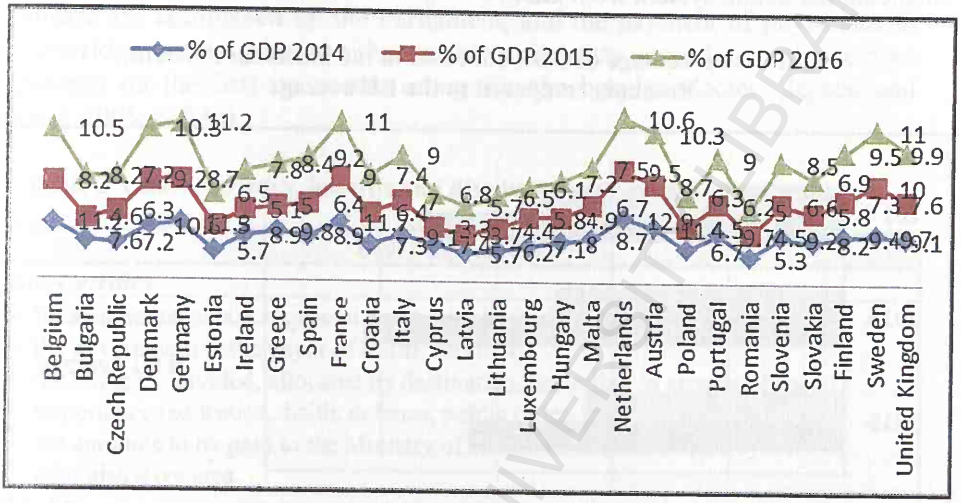
In the European Union, funding for the health system needs to be done in such a way as to meet the following objectives (Thomson, Foubister and Mossialos, 2009, pp. 25-26):

- promotion of universal protection against financial risks associated with poor health status; financial protection aims to ensure that people do not become poor due to the use of healthcare;
- promoting a fair distribution of the contribution to the health system; financial equity requires richer people to pay more for medical care as a proportion of their income compared to poorer people;
- promotion of fair use and provision of services; the equity of access to healthcare based on need and not on the ability to pay;
- improving the transparency and accountability of the system; for example, by ensuring that the rights and obligations of the population are well understood, addressing the issue of unofficial payments through monitoring and reporting;
- ewarding the healthcare staff with the institution for good quality care and boosting efficiency in organizing and delivering services;
- promoting administrative efficiency.

In The World Health Report 2000, the World Health Organization defines the health system as „all the organizations, institutions and resources devoted to health improvement" (World Health Organization, 2000). Funding a health system refers to how funds are needed to carry out activity in the health sector, and how these funds are allocated and then used. The chosen financing method, together with the type of organization of the healthcare system, determine the categories of persons with access to these services, the cost of care, the efficiency and the quality of the offered services. All these interim results, in turn, determine the end results of any health system: health status of the population, financial protection against risks and, last but not least, the satisfaction of service consumers. Thus, depending on the degree of development and priorities, countries allocate

a certain percentage of GDP to this sector, a percentage that should fully cover the needs of the system as well as the degree of demand from the population.

Figure 1. Percentage of GDP allocated to healthcare in EU countries



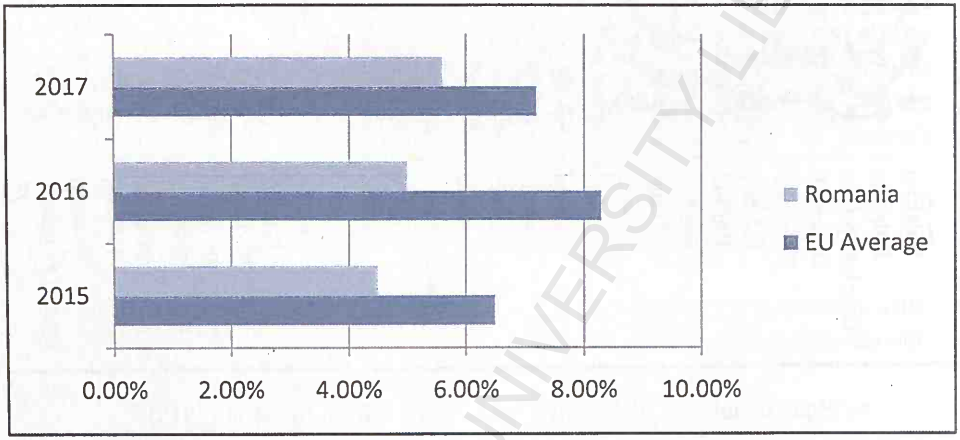
Source: authors' elaboration based on data from Eurostat (2018)

In most EU Member States, the passage of the years means a higher percentage of GDP in the health services sector (Figure 1). It is well known that this differs according to the degree of development of each country, so that developed countries view population health as a priority for sustainable economic growth and thus the share of GDP allocated to this sector is higher compared to less developed countries, countries that are unlikely to evolve without having a high standard of health. The gap between countries in terms of the percentage of the health sector in 2014 and that granted in 2016 shows that the sector's spending is steadily rising, largely determined by the deterioration of the health of the population. Health care costs are evolving alongside existing policies and standards within the EU. In this respect, Romania was in the last place in 2014, accounting for 5.3% of GDP for health; in 2015, although the percentage allocated for this sector registered a decrease of 0.8% in our country, this fact was also observed in the level of other EU member states. For the year 2016, the percentage allocated to the health sector in our country increased by 5 percentage points compared to the previous year, but it remains lower compared to 2014, as well as to the rest of the EU member states.

For Romania, the last 3 years have a small percentage allocated to the health sector compared to the average existing in this respect in the UE (Figure 2). Thus, in 2015 Romania has a difference of two percentage points compared

to the EU average; in 2016, our country allocates only 5.0% of GDP to the health sector, a percentage which is much higher than the EU average. Also, for the past year, Romania recorded a difference of 1.6 percentage points in financing the health system from GDP.

Figure 2. Percentage of GDP allocated to the healthcare system, Romania compared to the EU average



Source: authors' elaboration based on data from World Health Organization (2016, 2017)

3. THE BEVERIDGE MODEL (MODEL OF THE NATIONAL HEALTH SERVICE)

It appears after the Second World War and was founded by William Beveridge in England (see Table 2). This model is primarily based on state funding and healthcare providers: nurses, doctors, and pharmacists. The model recognizes as a universal right for the entire population to receive healthcare from the public sector, roughly free of charge (van Gerven, 2005, p. 192).

This model involves financing medical services through the central state budget. The sector is organized and managed by the state, from resources collected through the public system of taxes, and the specialists in the services are public employees. As a deficient item, the demand for medical services has, in most cases, be excessive in relation to the resources in the system. The demand for secondary services is targeted at family doctors, and waiting lists are available for tertiary services. Patients have the right to choose their family doctor and may opt for private medical insurance. The advantage experienced by private insurers is that they can, under certain conditions, benefit from medical services without enrolling in waiting lists. The most frequent criticisms of the model come from the boundaries of the basic services package, from the limits

of resources allocated to the treatment of certain illnesses, and because of the too long waiting times, for the population that can not afford to take out private insurance. This model is experienced by the UK, but also by northern European countries: Finland, Norway, Sweden, and so on. The amounts allocated to healthcare are established by the Parliament, and the payment of physicians in the Beveridge system is based either on the capital (pay according to the number of patients on the list) or on the salary for the hospital doctor (Jepsen and Pascual, 2005, p. 236).

Table 2. Characteristics, benefits and disadvantages of the Beveridge model

Beveridge model
Characteristics
– funding sources: taxes, general taxes - public budget; – the government is the payer of health services; – the budget is divided, allocated by destination, according to criteria of social importance (education, halth, defense, public order, etc.); – the amounts to be paid to the Ministry of Health shall be allocated by administrative area.
Benefits
– equity in financing; – wide coverage of medical services; – the possibility of controlling total medical expenses; – the financing of medical services through the central state budget; – the system is organized and managed by the state;
– patients can choose their doctor; – patients may opt for private medical insurance; – ensure universal coverage of the population; – payment of the service is made after the administration of the therapeutic act; – risk groups have priority.
Disadvantages
– lack of individual participation in financing decisions; – lack of transparency in financing additional costs for additional health services; – political decisions can affect the financing of the health system; – the demand for medical services may prove excessive in relation to the resources in the system; – the basic service package limits; – the limits of the resources allocated to the treatment of certain diseases; – long intervals spent by patients on waiting lists; – waiting lists for staggered payment of therapeutic acts, for diseases and categories of patients; – medical staff do not benefit from incentives.

Source: authors' elaboration based on Duane (2003, pp. 174–176)

4. THE BISMARCK MODEL (MODEL OF THE SOCIAL HEALTH INSURANCE SYSTEM)

It is named after Chancellor Otto von Bismarck, who invented the model, in the nineteenth century (see Table 3). This model represents a partnership between the public and private sectors of health services (Manoj and Ashutosh, 2010, p. 391).

Table 3. Characteristics, benefits and disadvantages of the Bismarck model

Bismarck model
Characteristics
– the source of funding is the health contribution, which is compulsory both from the employer and from the employee; – contributions established by law are equal in percentage but are differently reflected in the level of contributing individuals in relation to the actual income obtained; – the participation rate of the institution and the employee is dependent on the policy of the executive and the economic potential; – insurance contributions are collected by the National Health Insurance Fund an independent government institution; – health policies are established by the executive with the Ministry of Health and National Health Insurance Fund; – National Health Insurance Fund selects models of health services delivery, payment models, conclude contracts with hospitals, polyclinics, medical offices.
Benefits
– transparency of system contributions and benefits; – the high coverage of the population with health services; – the contribution to the medical system is related to the level of each person's income; – political changes do not affect the funding of the system; – the institutions that manage the health insurance funds are non-profit institutions; – the activity of institutions managing health insurance funds is monitored at the public level; – money flows visible on system components; – service delivery is efficiently and timely; – health programs are in line with policies in the field; – The National Health Insurance Fund has functional independence from the executive; – allocation of health services is based on needs; – supports the rights of the insured persons.
Disadvantages
– reducing the taxpayer base during the economic recession; – funding is strongly linked to the level of employment; – high costs for economic agents; – some policies are not applied transparently; – the most equitable redistribution of resources is not achieved; – high administrative costs; – health services are for insured persons and disadvantaged groups; – difficulty in controlling the cost of medical services.

Source: authors' elaboration based on Goldberg (2016, p. 478)

It represents the system that has inspired the elaboration of the current social insurance system in our country. The system involves the financing of medical services on the social insurance principle, by the contribution of a part of the income by employers and employees, a generally mandatory contribution, depending on income. Institutions managing social insurance funds are non-profit institutions, and their activity is closely monitored at the public level. The model is frequently subject to criticism from healthcare professionals or patients, criticism that policies are not transparently applied, or that the most equitable redistribution of resources is not achieved. This model was preferred in countries where the masses of employees were, in the long run, consistent, and the collection of funds did not encounter difficulties. This system also uses public budget resources or other categories of grants to finance public health programs. Against the backdrop of rising unemployment, criticism of this model has become extremely vocal because of the difficulty in collecting resources (Audretsch *et al.,* 2015, p. 96).

The model provides comprehensive coverage, but non-income people represent categories of people with strict access to the medical system in emergencies. The amounts resulting from the establishment of funds for the financing of health insurance are directed to bodies that provide their management and who contract with the hospitals and family doctors, the range of services to be provided free of charge to the insured. Within this system, medical performance may be relatively high, but the costs involved are the highest in Europe because the administration of the system is costly (Goldberg, 2016, p. 478).

5. SEMASHKO MODEL (CENTRALIZED STATE SYSTEM MODEL)

Nikolai Alexandrovich Semashko has set up an integrated health department in the Soviet Union and developed the Semashko healthcare model. The model was set up on the premise that the government is responsible for providing healthcare (see Table 4). Control, funding, and organization within this model were conducted by the state (Cockerham, 2001, p. 165).

The Semashko model was founded in 1918 and is a model that guarantees access to health services for the entire population. It is a model, as a generic model, of the Beveridge model, in that the financing, organization, and management are carried out by the state, but also by the Bismarck model by collecting resources in the form of participation financing rates, applied to the wage bill. It differs from the Beveridge model by requiring patients to use only the services in their residential area and the Bismarck model in that they operate in an economic environment where private health insurance is lacking. It has been applied for many decades in former socialist countries, with different results from one to another country (World Health Organization Regional Office for Europe, Council of Europe Development Bank , 2006, p. 43).

Even before 1989, this system was considered disastrous, regretted by many countries because it was an effective model that allowed for better surveillance of health-related funds by the state. The Semashko system is, by and large, a socialist health system based on centralized planning and access to care for all citizens (Cockerham, 2001, p. 165).

Table 4. Characteristics, benefits and disadvantages of the Semasko model

Semasko model
Characteristics
– source of financing: taxes and general taxes forming the state budget; – control of the sale-purchase process is carried out at the territorial level through centralized programming and static execution; – access to medical services is free because it is not paid by the patient; – medical staff do not receive income through additional work; – system competition is absent because there is no private health system; – The Semasko system also works in countries that have a centralized economic system in Central and Eastern Europe.
Benefits
– financed from the state budget; – employed personnel with a fixed salary; – allows for better surveillance of health-related funds by the state; – access to care for all citizens.
Disadvantages
– insufficient financial resources; – controlled by the state; – based on centralized bureaucratic planning; – the state has the monopoly of services; – there is no private sector; – the quality of the therapeutic activity is affected by insufficient financial resources; – require patients to use only the reserved services in their area of residence; – operate in an economic environment where private health insurance is lacking.

Source: authors'elaboration based on Kirch (2008, p. 250)

6. THE PRIVAE HEALTH INSURANCE SYSTEM

This system contains elements from both the Bismarck model and the Semashko model so that health care providers are private, but funding comes from a state-run insurance scheme to which every citizen contributes (see Table 5). The insurance plan provides for the collection of monthly money and payment of medical bills. It is predominant in the U.S., Thailand, South Africa, the Philippines, Nepal and has been the exception in Western European countries (Knickman and Kovner, 2015, p. 231).

US Political Organization has been indirectly concerned with the issue of health, healthcare, and the health care system, generally considering that the particular system and market mechanisms can work better, with lower spending, and can have higher benefits without bureaucratic pressure. This system is the fact that medical care is a consumer good that individuals buy if they have financial possibilities, and society does not owe anybody medical care. US Social Policies are a mixture of volunteerism and liberalism, voluntarism assuming family and personal responsibility for well-being, and liberalism promoting some social policies centered on meeting needs, especially those of the poor. Prior to World War II, hospital care in the U.S. was offered exclusively surcharge. In the post-war period, the Blue Cross and Blue Shield private insurance system were founded, consisting of contracts concluded between insurance institutions and business representatives. Low-income or non-working people did not benefit from this scheme. The only large-scale programs are those created by the Kennedy and Johnson administration in the 1960s, where two national health insurance systems were established: Medicaid-1965 - for people with low incomes and Medicare-1965 - a national basic insurance scheme for hospitalization for people over 65 years old (Roemer, 1993, pp. 336– 338).

Table 5. Characteristics, benefits, and disadvantages of the private health insurance system

The private health insurance system
Characteristics
– in Europe, this model represents approximately 20% of the insurance; – the system is mainly functional in the USA; – disadvantaged categories are covered by special programs; – the patient, through the private insurance model, selects the institution, the quality service and includes a patient-doctor financial relationship;
Benefits
– the particular system and market mechanisms can work better; – lower expenses and higher benefits without bureaucratic pressure;
Disadvantages
– medical care is a good consumer that individuals buy if they have financial possibilities; – society does not owe anybody medical care; – people with high risk of illness will be included in the system through a specific selection;

Source: authors'elaboration based on Knickman and Kovner (2015, p. 231)

7. CONCLUSIONS

It can be said that the level of health spending in a society depends on its development level. Making changes in this sector is difficult because healthcare is a very dynamic environment that permanently requires financial support. Innovations in health technology trigger dynamic changes, emerging and

demographic diseases, climate change, and new treatment challenges. The organizations face a continuing barrier to new regulations and changes in funding patterns.

Thus, a representative financing process or an efficient and necessary policy at one point could have irrelevant effects, with major updates needed to become relevant. This sector must evolve and adapt not only to maintaining and improving the quality, performance, and safety of patients but also to surviving. The standard principles of safe and effective healthcare are continually evolving, so the way they are achieved must be consistent, requiring financial support. Health systems in EU countries are a combination of health economics models. So, if in the past the systems functioned strictly according to a particular model, in time there were influences from other models considered by the decision-makers to be favorable because they were successful in other states.

The health system in Romania represents the revised Bismarck model, influenced by the Semasko and Beveridge models. Private health insurance is a voluntary system, in addition to that of compulsory health insurance, covering the organization and functioning of supplementary or substitutive supplementary health insurance.

References

1) Audretsch, D., Lehmann, E., Richardson, A. and Vismara, S. (2015). *Globalization and Public Policy. A European Perspective.* Switzerland: Springer International Publishing.
2) Cockerham, W.C. (2001). *The Blackwell Companion to Medical Sociology*. USA: Blackwell Publishers.
3) Duane, A.M. (2003) *Health Care Systems of the Developed World: How the United States' System Remains an Outlier*. USA: Praeger.
4) Eurostat, (2018). *Statistics explained. Healthcare expenditure by function, 2015 (% of current healthcare expenditure).* [online] Available at: http://ec.europa.eu /eurostat/statistics-explained/images/c/c0/Healthcare_expenditure_by_function%2C_2015_%28%25_of_current_healthcare_expenditure%29_FP18a.png [Accessed 05.04.2018].
5) Goldberg, A.E. (2016). *The SAGE Encyclopedia of LGBTQ Studies*. USA: Sage Publications, Inc.
6) Jepsen, M. and Pascual, A.S. (2005). The European Social Model: an exercise in deconstruction. *Journal of European Social Policy*, 15(3), pp. 231- 245.
7) Kirch, W. (2008). *Encyclopedia of Public Health (volume 1).* New York: Springer Science and Business Media, LLC.
8) Knickman, J.R. and Kovner, A.R. (2015). *Health Care Delivery in the United States*, 11th ed. New York: Springer Publishing.
9) Manoj, S. and Ashutosh, A. (2010). *Essentials of International Health*. USA: Jones and Bartlett Publishers.

10) Mullner, R.M. (2009). *Encyclopedia of Health Services Research*. USA: Sage Publications.
11) Paolucci, F. (2011). *Developments in Health Economics and Public Policy,* vol. 10, Health Care Financing and Insurance Options for Design. Berlin: Springer-Verlag.
12) Roemer, M.I. (1993). National Health Systems throughout the World, *Annual Reviews Public Health*, 14, pp. 335- 353.
13) Thomson, S., Foubister, T. and Mossialos, E. (2009). *Financing health care in the European Union. Challenges and policy responses*. The European Observatory on Health Systems and Policies, Denmark.
14) van Gerven, W. (2005). *The European Union. A Polity of States and Peoples*. California: Oxford University Press.
15) World Health Organization, (2000). *The World Health Report 2000. Health Systems: Improving Performance*. Geneva, Switzerland. [online] Available at: http://www.who.int/whr/2000/en/whr00_en.pdf [Accessed 05.04.2018].
16) World Health Organization, (2016). *World health statistics 2016: monitoring health for the SDGs. Sustainable Development Goals*. [online] Available at: http://www.who.int/gho/publications/world_health_statistics/2016/EN_WHS2016_TOC.pdf [Accessed 05.04.2018].
17) World Health Organization, (2017). *World health statistics 2017: monitoring health for the SDGs. Sustainable Development Goals*. [online] Available at: http://apps.who.int/iris/bitstream/handle/10665/255336/9789241565486-eng.pdf;jsessionid=3F73310D012CCBA3A7A784EB29CAA714?sequence=1 [Accessed 05.04.2018].
18) World Health Organization Regional Office for Europe, Council of Europe Development Bank, (2006). *Health and Economic Development in South-Eastern Europe*. Paris: World Health Organization.

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ASSESSMENT OF IMPACT OF THE UKRAINE'S HYDRO POWER EXPANDING PROGRAM ON SUSTAINABLE DEVELOPMENT OF AQUATIC ECOSYSTEMS IN THE BLACK SEA REGION

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Abstract
The basic principle of ensuring environmental security is to determine the level of permissible environmental risk, taking into account economic and social factors in the process of human activity.
In order to prevent the aggravation of the environmental problems, to prevent a potential environmental damage and destruction ecosystem of the Dniester in particular, the public health, as well as the economic foundations, not only for the Republic of Moldova and the Ukraine, but for the whole Black Sea region, should consolidate the efforts of all interested structures and actors (including the non-governmental sector), to block the implementation of the Ukraine hydro power expanding program.
Now, the Dniester cascade of hydro power plants have already led to negative consequences, but the future construction of another complex of six hydroelectric power stations will cause even more environmental problems. Additional six hydroelectric power stations have been planned for construction in the next 10 years according to Ukrainian Government Program of Hydropower Development until 2026.
The lack of basin approach in the usage of aquatic resources of this transboundary river, as well as the noncompliance with provisions of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes can lead to an ecological catastrophe both for the Dniester River, Black Sea wetlands and Black Sea by itself.
That's why in the decision making process about six hydro power plants, the states should achieve a harmonious combination of the three components of the concept of sustainable development (environmental, economic and social), which are closely intercconnected and only such a combination, would achieve the necessary balance in development.
Taking into account the prevailing situation in the region, it is necessary to elaborate and adopt special convention on the Dniester based on a unified concept by the coastal states. Implementation of environmental policy of the states is not possible outside the context of the law-making process.

Keywords: *sustainable development; environmental security; transboundary river; hydro power plants; convention.*
JEL Classification: K32, K33

1. INTRODUCTION

Over the past decades, the struggle for the preservation of the natural environment, from local and regional, has turned into a global task that, in the context of deepening the ecological crisis, can be solved only through joint efforts of the entire world community, comprehensively and in priority order, because it directly affects the conditions of survival and health of people, the economic interests of society and the prospects for its sustainable development.

For more than 20 years, the concept of sustainable development has undergone many changes, supplemented with new content and international acts adopted in various conferences and summits on this topic have created a legal platform for further promotion of this concept at the national level.

2. THE BASIC ELEMENTS OF SUSTAINABLE DEVELOPMET

Sustainable development as the concept of the modern world order has its roots, in particular in the report "**Our common future**" of the World Commission on environment and development, prepared and submitted by the Brundtland Commission appointed by the UN General Secretary. The Commission worked in 1984-1987 and prepared its report in the form of the book "Our common future", which is based on the concept of sustainable development (Our Common Future: Report by the International Commission on Environment and Development, 1989).

In September 2015, 170 leaders from all over the world gathered at the UN Summit on sustainable development in New York for the adoption of the Agenda until 2030. The new agenda includes 17 sustainable development goals (SDGs) and 167 objectives and has become a comprehensive program that will guide global and national development activities in the next 15 years. The SDG is the result of the largest consultations in the history of the United Nations involving a large number of stakeholders, based on international human rights standards; the agenda offers significant opportunities for furthering the realization of human rights for all people around the world without any discrimination (Sustainable development knowledge platform, 2018).

The concept of sustainable development pursues the goal of preserving and multiplying various forms of capital: economic, ecological and social, which form the basis of public welfare and the development of future generations.

The most potentially far-reaching aspect of sustainable development is that for the first time it makes a state's management of its own domestic environment a matter of international concern in a systematic way. Moreover, to the extent that sustainable development can be regarded as a legal principle involving some

degree of international supervision – it might be said that this aspect of domestic environmental protection may by implication also be a matter of 'common concern', although the Rio Declaration itself does not say so (Birnie, Boyle and Redgwell, 2009, p. 129).

At its 93rd Plenary Meeting on December 7, 1987, General Assembly resolution No. 42/93 on a comprehensive system of international peace and security was adopted, which notes that unsolved environmental problems can easily outgrow into international tension and conflict (United Nations, 1987).

The Republic of Moldova, along with other countries, makes efforts to introduce the concept of sustainable development, according to the Concept of environmental policy of the Republic of Moldova, approved by Parliament Resolution No. 605 of 02.11.2001.

However, the most important policy document designed to establish clear priorities in environmental protection activities, the practical implementation of which will lead to sustainable development of the country, is the Strategy of the environment for the years 2014-2023, approved by the Government of the Republic of Moldova Resolution No. 301 of 04.24.2014.

3. THE IMPACT OF THE COMPLEX OF HYDROELECTRIC POWER STATIONS ON THE ENVIRONMENT OF THE DNIESTER RIVER BASIN

Increasing attention to the problems of the protection and sustainable development of the Dniester river basin in our country is caused by aggravating trans-boundary environmental problems caused by significant technogenic impact as a result of the work of hazardous enterprises in the extractive, chemical, petrochemical, food and agricultural industries.

The Dniester is one of the most significant rivers in Europe, with a length of 1362 km and a catchment area of 72 000 km. Half of this length or 652 km (Middle and Lower Dniester) lies within the Republic of Moldova while the remainder crosses the densely populated areas of Western and South Western Ukraine. In total around 8 million people. Up to 4 million people, mostly from Moldova and the Ukrainian city of Odessa, use the water from the Dniester Basin for drinking purposes (Efros, 2018, p.5).

The problem takes on transboundary dimensions as polluted water flows into Moldova from Ukraine and thereafter back into Ukraine again and is discharged into the Black Sea south-west of the city of Odessa (Global Water Partnership, 2013).

In Soviet times the water basin was managed as a united system, but from 1991 Moldova and Ukraine have separately regarded their parts, which is not effective for sustainable river management. In 1994 an inter- governmental agreement between these two countries for the boundary waters was signed, but this treaty mostly regulates water use. The biological resources of Dniester as

well as ecological systems have no joint management. This has happened because of multiple reasons, but mostly as a result of slow awareness and interest of decision makers in resolution of environmental issues, as well as the existing political tension, related to the Transdniestrian conflict. During last period the Dniester environmental problems have become even more acute (like spills of communal wastes dealing with the fact that, in several cases, purification installations of Moldovan towns are situated in Ukraine and Transdniester), and seriously destabilized the situation in general. The input of Dniester to organic pollution of the NW Black Sea region is 1730 thousand tones per year, i.e. more than twice that of the larger Dnieper River (OSCE and UNECE, 2005).

Public organizations and scientists of the Republic of Moldova and Ukraine have repeatedly expressed their concern that Novodnestrovskaya HPS (called «Dniester hydropower complex» from 1958) has changed the hydrological and temperature regimes of the Dniester River, which threatens the biodiversity of the water basin as a whole. Moreover, the outdated rules for operating HPS that do not meet the new risks of climate change lead to a shortage of water in the delta of the Dniester, and a minimum water level is not ensured, which leads to a disruption of the self-healing function of the river and the destruction of its unique ecosystem.

Data for the normal (constant minimum) debits are also discouraging. During the first half of 2017 and in the first half of 2016, according to the materials of the Ukrainian researchers, the water discharge from HPP-2 on Moldovan territory was more than 200 m3/s for only 16 days (in the spring during spawning period), 150-200 m3/s for 11 days, 120-130 m3/s -52 days and - about 100 m3/s - 103 days. At the same the idle flow (past turbines) was 0 m3/s for about 120 days, for 79 days was 2-54 m3/s, and only 1 day - 100 m3/s. This indicates that the water near the Naslavcea does not enter the Dniester constantly and sufficiently, which is inconsistent with the design documents of this dam, according to which the minimum permanent sanitary (or critical) release should be at least 75 m3/s even in period of abnormally high drought. High variation in volume and temperature of water that is discharged by the Dniester hydropower complex negatively affects the development of flora, fauna, and bacteria in the Lower Dniester. This causes a decrease in its diversity and predetermines the delay of spawning and the development of fish (Efros, 2018, p.13).

A paper of Academy of Sciences of Moldova presented at a recent conference dedicated to Dniester presents the following diagnostic: "The key impacts of the Dniester hydropower complex (Dniester HPP-1, Dniester HAPP, Dniester HPP-2) on the Middle Dniester ecosystem are as follows: modification of seasonal and daily river flow fluctuations; changes in turbidity levels; modification of temperature and oxygen regime. According to the long-term data of the Laboratory of Hydrobiology and Ecotoxicology (Institute of Zoology,

Academy of Sciences of Moldova), the annual range of temperature fluctuations at the sector Naslavcea – Valcinet (downstream the Buffer Reservoir) is 3 – 18oC. Such a low water temperature cause a significant decline in productivity of phyto- and bacterioplankton than it is typical for this climatic region. All these impacts are factors affecting ecological state of the river ecosystem." (Jurminskaia, 2017).

The consequences are especially dramatic for the Republic of Moldova, because Dniester is the country's key source of drinking water. Cities like Chisinau (700000 inhabitants), Balti (close to 150000) and smaller towns such as Rezina, Soroca, Criuleni, Orhei use this source of daily drinking water directly from the Dniester. The lack of any environmental guarantees, almost certainly issues such as desertification, soil erosion and lack of fresh water risk to becoming a permanent phenomenon that can trigger a humanitarian crisis, depopulate the territory of Moldova, and cause a permanent conflict with Ukraine due to water scarcity. From this point of view, estimating that at least 500,000 Moldovans may be forced in the medium term to leave their country because of the lack of the primary source of life does not appear to be an exaggeration (Efros, 2018, p.10).

Despite the fact that the repeated meetings of the Prime Ministers of the Republic of Moldova and Ukraine ended with benevolent promises of cooperation regarding the operation and development of the Dniester hydropower complex, no real changes are observed. The meeting of the Prime Minister of the Republic of Moldova with government officials on August 28, 2017, devoted to the discussion on the progress of bilateral negotiations on the energy exploitation of the Dniester hydropower complex and its impact on the environment, shows that there are problems and the public is reasonably concerned by the fact that at the governmental level they are limited to empty, political promises. Moreover, we agree with the opinions of environmental scientists that at the level of the two Governments are not aware of the full danger of an impending ecological catastrophe in the whole region.

The current situation is aggravated by the following factors: weak political will of the governments of the two countries and inability to conscientiously fulfill the international obligations assumed, unpreparedness to fulfill the increased obligations undertaken to implement European environmental standards. All these burdensome realities on the way to sustainable development testify to the impossibility of taking a balanced decision on the construction of new six hydroelectric power stations in the upper reaches of the Dniester River (five river channels and one derivational one). The Cabinet of Ministers of Ukraine adopted on July 13, 2016 the program for the development of Ukrainian hydropower until 2026, which provided for the construction of the Upper Dniester cascade.

To date, the existing Dniester cascade of HPS has already led to negative consequences, but the future construction of another complex consisting of six hydroelectric power stations will entail even more environmental problems.

Considering that the Dniester is a trans-boundary river basin of Moldova and Ukraine, the main water artery for our republic, the second largest river for the neighboring state, at the political level, prevention issues, strategic environmental impact assessment, trans-boundary surface and groundwater management and their protection, elimination of man-made risks, improved protection of biodiversity and ecosystems, adaptation to climate change should be a priority and their solution only taking into account the main priorities of international and regional cooperation to ensure sustainable development of the region.

An example of political shortsightedness can serve as a negative experience in the construction of the Gabchikovo dam, which led to the gradual destruction of the largest massifs of alluvial coastal forests (Land, 1992).

The project for the construction of a cascade of HPS on the Dniester threatens a significant change in the water level, the flooding of agricultural lands, the disappearance of animals listed in the Red Book, the deterioration of the quality of drinking water and lead to other negative consequences that may have an adverse effect on public health. According to the scientists of the Republic of Moldova, the continuation of hydropower development of the river will lead to an ecological catastrophe in the Black Sea region.

The Dniester flows into the Black Sea, which already receives less than 40% of the fresh water from the river tributaries, which is why the level of hydrogen sulphide has increased significantly. According to Elena Zubkova, "If this layer rises to the top, there will be no living beings within a radius of 300 kilometers." The maximum depth of the Black Sea is just over two kilometers, while the thickness of the layer of so-called clean water, in which life is concentrated, is only 100 meters. The surface layer of the Black Sea water is predominantly of river origin, that is, its level is maintained by the inflow of river water (Zubkova, 2017).

The construction and operation of these facilities presents a real threat to the environment not only for the Republic of Moldova and Ukraine itself, but also for the entire region (including the Black Sea basin). This project is a clear example of ignoring native (natural) laws, potential catastrophic consequences for the natural environment and the economy and is contrary to the Protocol on Strategic Environmental Assessment (SEA) to the Espoo Convention on environmental impact assessment in a trans-boundary context, the provisions of which are reflected in the Association Agreement Ukraine-EU, as well as the Aarhus Convention on access to environmental information, public participation in environmental decision-making and access to justice on environmental matters.

In any case the obligation to obtain the consent of neighbouring states ("affected parties") for projects with cross-border environmental impact is

stipulated in the international agreements signed by Ukraine and Moldova (e.g. ESPOO Convention signed by Ukraine in 1999 and Republic of Moldova in 1994), as well as environmental legislation that is to be compulsorily enforced by the two countries, in line with the commitments of the Association Agreements and the Energy Community Treaty (Efros, 2018, p.8).

Therefore, when deciding on the construction of six hydroelectric power stations with reservoirs on the Dniester River, stakeholders should achieve a harmonious combination of the three components of the concept of sustainable development, which are closely interrelated and only such a balance reached, is capable of giving the necessary stability to development.

4. THE TRANSBOUNDARY MANAGEMENT OF THE DNIESTER RIVER BASIN

Bilateral relations on cooperation in the field of protection and sustainable development of the Dniester River are regulated by the Agreement, which was signed on November 29, 2012 in Rome at the 6th session of the meeting of the parties to the Convention on the protection and use of trans-boundary watercourses and international lakes. Ukraine ratified this agreement in June 2017, which in our opinion is a great achievement, but such a long period of entry into force of the agreement negatively affected the real content and significance of this document in view of the current situation in the light of the new plan for the development of hydropower in Ukraine. The text of the agreement needs to be reviewed and proposed to make changes that correspond to the realities of the need for legal settlement of a number of problems: guaranteed minimum water level in the river, issues of water abstraction and discharge, ensuring environmental safety, increasing public awareness and participation in decision-making and, of course, guaranteeing contract compliance and compensation for damage caused.

Among the most pressing legal problems of ensuring environmental safety in this region is the international legal status of the Dniester River, which is not defined in the above-mentioned agreement. By geographical features, the rivers have different status: border rivers, regional rivers that flow through the territory of two or more countries without access to the sea, and international rivers that have access to the sea. Accordingly, the ecological and legal status of the Dniester should be formed on the basis of specially developed by the coastal states for the given region, taking into account its natural and socio-economic features of interstate agreements, which will allow introducing elements of the legal regime in accordance with international rules.

Analysis of the contents of the agreement signed by the Republic of Moldova and Ukraine allows us to conclude that the document does not provide a clear delineation of the territorial zones of the Dniester river basin, which in our opinion does not allow us to regulate the appropriate legal regime for the use

and protection of territories in full, differing from each other by some indication. Moreover, the zoning of the Dniester river basin will allow developing a methodology for improving and applying existing rates and methods for calculating the amount of losses, with a view to implementing the "polluter pays" principle, which experiences difficulties in law enforcement practice.

The current negotiations between the Moldavian and Ukrainian Governments for concluding new Agreement of the functioning of Dniester hydropower complex are completely non- transparent, blatantly circumvent international and EU environmental legislation and principles of good practice in the Energy Community.

The draft Agreement under negotiations does not make any reference to the Energy Community Treaty or to the Association Agreements signed by the European Union with Ukraine and the Republic of Moldova.

The Declaration on hydropower and sustainable development, adopted in October 2004, in Beijing (Beijing Declaration on Hydropower and Sustainable Development, 2004), the participants called on government to develop clear procedures for planning hydropower projects taking into account the entire river basin and energy production alternatives, in which planning provides for a rigorous assessment of all factors: environmental and social, as well as environmental and financial. Failure to take into account these requirements can lead to long-term contamination of drinking water sources, both surface and groundwater, will inevitably lead to depletion and, as a result, will exacerbate tensions in relations between states.

Summarizing, the Dniester is the country's key source of both surface and drinking water for over 80% of population. At the same time Dniester has a regulating role for the ground and underground water. Decreasing the water in the Dniester will seriously hit the population. The alternative solutions of Moldova to access sources of drinking water are expensive and unrealistic.

5. CONCLUSIONS

Following the formation of a well-founded international legal status of the Dniester, the issues of the implementation of international norms in the legislation of coastal states, the development of legal regulation of the relations of rational use of natural resources and environmental protection in the Dniester river basin at the interstate and national-state level acquire serious significance. Part of this work, currently taking into account the prevailing situation in the region, it is expedient to prepare and adopt on a single conceptual basis special laws on the Dniester by the coastal states. Legal provision of the state's environmental policy is not possible outside the context of the legislative process.

The adoption on August 30, 2017 by the Cabinet of Ministers of the Republic of Moldova of the Dniester river basin protection plan for the period 2017-2020, which provides for the protection and long-term use of the river's water resources, is an unsuccessful attempt to cover the accumulated gaps in

environmental legislation, preventive measures to combat the depletion of water resources, as well as to combat drought, floods and eliminate their harmful effects. Failure to comply with environmental legislation is massive and the situation will change for the worse if the state, in carrying out its environmental function, resorts to moral and political measures to regulate social relations.

It should be noted that the adopted plan at the national level would not have a special effect in resolving the accumulated problems in the relations of the two countries with respect to the existing Novodnestrovskaya hydroelectric power station and further planning the development of hydropower in Ukraine. First, Moldova unilaterally carried out a number of preventive measures to avoid negative impact was not able, until now, in view of the fact that the source of damage is not within its territorial competence and the state has no potential (political, economic and technical). Secondly, the problem needs comprehensive measures to be taken bilaterally. The current situation in Ukraine is reflected in the priorities of state policy, which weakly affects the protection of the environment. Thirdly, this plan is relevant in view of what should be accepted by the parties before the signing of the bilateral agreement of 2012, is attached to the document as part of it, establishing moral and political rules of a regulatory nature.

According to Nikishin V.I. the regulatory role of environmental imperatives is largely determined by the level of environmental legal and moral consciousness (Golichenkov, 2004, p. 66). To ensure compliance and stability of behavior regulators, it is necessary to maintain a balance of legal and moral means of regulation. The diversity of national water laws, traditions, the mentality of the population, approaches to solving problems of the authorities, leaves its imprint on the state of the Dniester river basin, and also requires the development of unified standards and approaches not only in the exploitation of its resources, but also in protecting the ecosystem as a whole.

Particular attention should be paid to the process of formation of norms of interstate convention on the Dniester, which should be drawn by the states of the Black Sea region, taking into account the close interconnection of anthropogenic impact on the Dniester and the Black Sea. Taking into account the current situation in this region, it is obvious that it is necessary to create an interstate body and give it broad powers to manage the ecosystem of the river and the sea, necessary to ensure a guaranteed ecological regime in the region. Almost all ecologically significant activities within the framework of the Dniester and Black Sea basin management should be carried out by the coastal states through this body and be monitored by the latter one. The list of its powers should be determined in a contractual manner by the coastal states. Taking into account the international practice of joint management of ecosystems of trans-boundary reservoirs and regional features of these water objects, it is possible to determine the most optimal forms of activity and the organizational structure of this body.

At the same time, the management system should have different territorial levels relative to the Black Sea as a whole, the Dniester river basin, administrative-territorial units (republic, city, and district).

References

1) Beijing Declaration on Hydropower and Sustainable Development, (2004). [online] The UN Symposium on Hydropower and Sustainable Development. Beijing, October 29, 2004. Available at: http://www.un.org/esa/sustdev/sdissues/energy /hydropower_sd_beijingdeclaration.pdf [Accessed 15.06.2018].
2) Birnie, P., Boyle, A. and Redgwell, C. (2009). *International Law and the environment*. Oxford: Oxford University Press.
3) Efros, I. (2018). *Why the Ukrainian hydropower infrastructure on Dniester will destroy Moldova and how to prevent such a disaster?*. Chişinău: Institutul de Politici Publice.
4) Global Water Partnership, (2013). *Moldova: Analysis of transboundary management of the Dniester river basin*. [online] Available at: https://www.gwp.org/en/learn/KNOWLEDGE_RESOURCES/Case_Studies/Europe/Moldova-Analysis-of-transboundary-management-of-the-Dniester-river-basin-425/ [Accessed 26.06.2018].
5) Golichenkov, A.K., ed. (2004). *Environmental law of Russia. A collection of materials of scientific and practical conferences. Anniversary publication. 1995-2004.* Vol. 1, compiled by: A.K. Golichenkov, I.A. Ignatieva and A.O. Minyaev. – M.: TISSO.
6) Jurminskaia, O. (2017). Assesment of the potential of the Dniester River and its tributary to recover the oxygen concentration. In: *Transboundary Dniester River Basin Management: Platform for Cooperation and Current Challenges, Proceedings of International Conference, Tiraspol, October 26-27, 2017*. Tiraspol: Eco-TIRAS, pp. 109-113.
7) Land, T. (1992). The Danube: Dams over Troubled Waters. *Nature,* 355(6358), p. 289.
8) OSCE and UNECE, (2005). *OSCE/UNECE Project: Transboundary Co-operation and Sustainable Management of the Dniester River. Transboundary Diagnostic study for the Dniester River Basin.* [online] Available at: https://www.osce.org/eea/38320?download=true [Accessed 08.05.2018].
9) Our Common Future: Report by the International Commission on Environment and Development (1989). Evteev, E. and Perelet, R., eds. M.: Progress.
10) Sustainable development knowledge platform, (2018). *Transforming our world: the 2030 Agenda for Sustainable Development.* [online] Available at: https://sustainabledevelopment.un.org/post2015/transformingourworld [Accessed 06.05.2018].
11) United Nations, (1987). *General Assembly resolution No. 42/93.* [online] Available at: http://www.un.org/documents/ga/res/42/a42r093 [Accessed 06.06.2018].
12) Zubkova, E. (2017). *Молдова может оказаться в зоне поражения катастрофического взрыва (Moldova may find itself in the zone of destruction of a catastrophic explosion).* [online] Sputnik Moldova. Available at: https://ru.sputnik.md/incidents/20170211/11196945/vzriv-serovodorod-cernoe-more.html [Accessed 16.06.2018].

PERCEPTIONS ON RURAL VOLUNTEERISM AND ITS CONTRIBUTION TO SUSTAINABLE DEVELOPMENT IN ROMANIA. A CASE STUDY

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Abstract
The seventeen Sustainable Development Goals which will have to be reached by 2030, will require significant human and financial resources, including increased volunteer – based participation. Over the past years, at the European Union level, increased focus was being put on the importance of developing a quantification method for the social and economic value that volunteerism brings in the society. In Romania, the percentage of people who did not get involved in volunteerism remains high, although is decreasing (from 80% in 2010 to 72% in 2016), as revealed by a recent report published by the Civil Society Development Foundation. The aim of the case study subject to the current research was to identify the social and economic values of volunteerism in a rural Romanian commune, as they are perceived by three major community leaders – mayor, school principle and priest. Data were collected using key informant interview method, and then analysed using content analysis. The findings of the research showed that the concept of volunteerism is more understood at an informal level. Additionally, no management processes and practices of volunteerism were identified. In relation with sustainable development, the social value of volunteerism was identified under the form of collective education, while lacking awareness on its economic value.
Keywords: *volunteerism; management; sustainable development; rural.*
JEL Classification: H83, J24, O15, Q01

1. INTRODUCTION

Volunteers are a specific human resource category in an organization, with different needs and motivational factors, compared with contract - based employees. That is why a dedicated employee is required to handle all the processes related to their management, usually that person being the volunteers' coordinator or manager. According to the definition of volunteerism offered by the International Labour Organization, *volunteerism* is "Unpaid non-compulsory work; that is, time individuals give without pay to activities performed either through an organization or directly for others outside their own household." (International Labour Office, 2011, p.13).

In September 2015, leaders of the world agreed upon a set of seventeen Sustainable Development Goals, which have to be accomplished by 2030. These

goals will involve significant human and financial resources (financially, it is estimated that trillions of dollars will be needed as financial investments) to be reached (Rieffel, 2015). Therefore, it is easy to anticipate that increased involvement of all individuals (if possible) will be needed, under various forms.

Given the context, the role and contribution of volunteers in sustainable development are gaining in importance and meaning. *United Nations Volunteers* Organization (UNV) clearly mentions in one of their working papers that "together with partners", over the next 15 years, UNV will have to ensure volunteerism evolves from the phrase „it is good to have", to a stage where it is in the centre of development programs practice (UN Volunteers, 2016). Classical ways of development programs implementation will need to be accompanied by participatory mechanisms and increased involvement of community members.

Additionally, at the European Union level, increased focus is being put on the importance of developing a quantification method for the social and economic value of volunteerism and its impact in the society, by each of the EU member states (VOLUM Federation, 2016).

All of the above – mentioned are arguments for the Romanian context to reconsider the added – value of volunteerism. Since 2001, when the first Law of Volunteerism has been adopted (Law 195/ 2001), lastly reviewed in 2014 (Law 78/2014) and enforced in July, 2014, important steps have been made to recognise the efforts that thousands of individuals are making, occasionally or consistently, to support communities and people.

Most recent report, in which information about the development stage regarding volunteerism in Romania are given, is the one made by the Civil Society Development Foundation (in Romanian - FDSC). In the report entitled „Romania 2017. Nongovernmental Sector: Profile, Tendencies, Challenges", it is stated that the collected data reveal an increase in the percentage of people who declare they were involved in volunteerism at least once, for either church or community, from 19% in 2010, to 28% in 2016. Still, the percentage of people who didn't get involved in volunteerism remains high, although is decreasing (from 80% in 2010 to 72% in 2016) (Civil Society Development Foundation, 2017, p.53). Surprisingly, the report shows that Moldova region is on the first place among all Romanian regions, regarding the percent of people who participated in volunteer – based activities at least once, for either church or community (38%), and rural volunteerism is higher than urban volunteerism (34% compared to 23%).

Very few studies about rural volunteerism have been made in Romania.

This article explores rural volunteerism perceptions from three major community leaders in a rural area: the mayor, the school principle and the priest. At the rural community level, where there are very few NGOs which offer social or educational services, formal volunteerism in public institutions, practiced as an organizational component, is barely present, in spite of the fact that there are

volunteer-based structures stipulated in the Romanian legislation. It is the case of Community Consultative Councils (CCC), provided as a dialogue and consultation partner in solving social work problems at the community level (and more), as stated and described in Law 272/2004, regarding the protection and promotion of children's rights. These structures do not have a juridical status, are non-governmental and (should) carry on social activities locally, based ***on volunteerism.*** Rural environment also includes the Volunteers Services for Emergency Situations (in Romanian, SVSU) within the Mayor's Office (Emergency Ordinances 25/2004 and 191/2005, Government Ordinance 88/2001) and Parish Councils, which function nearby each community church.

The qualitative information was collected from the mayor, school principle and priest in a rural Romanian commune. They answered a set of questions during a key informant interview we held with each of them, using a structured interview guide (see Appendix 1). The transcripts of the interviews have then been analysed using content analysis method. The codes and key messages identified were the basis for the major research results and conclusions regarding the social and economic effects of volunteerism, as seen and perceived by the interviewees.

Our data suggest that volunteerism is perceived at an informal level and no special attention is being paid to measuring the contribution of volunteerism to sustainable development (Haddock and Devereux, 2015). Respondents indicate volunteerism is present in the community, but at a pioneering stage. There are no measurement and management practices for volunteers' work, due also to a low level of awareness around the concept and poor preparation and training on this specific subject.

Analysing the data from the last report published by The Civil Society Development Federation in Romania, along with the Romanian context as a whole, where the problem of quantifying the social and economic value of volunteerism (Huiting, 2011, p. 4-6) hasn't been put on the public agenda (despite the efforts made by civil society representatives), it would be interesting to see what is the connection between the level of involvement of community members in volunteer – based activities and the level of poverty in the community (Points of Light Foundation and Volunteer Centre National Network, 2004). As the report of FDSC showed, Moldova region is the poorest region in Romania, although it registered the highest percentage of people involved in volunteerism (so highest social participation). Could this relationship be affected by the fact that there are no measurement tools and management practices used for volunteer – based activities? What is the contribution of volunteerism to the sustainable development of a community (social and economic value) (Institute of Development Studies, 2015), in relation with the indicators and targets of 1st (End poverty in all its forms everywhere) and 4th (Ensure inclusive and equitable quality education and

promote lifelong learning opportunities for all) sustainable development goals (United Nations Economic and Social Council, 2016)?

Through the qualitative analysis subject to the current article, we wanted to make a step further for a long-term, more thorough analysis on rural volunteerism in Romania.

2. METHODOLOGICAL APPROACH

The collection method of qualitative data used for this stage of the research (pre - testing) was the key informant interview method. The qualitative data from the transcript of audio recorded interviews (unstructured text), have been the basis for the qualitative data analysis.

The key informant interviews were held with the representatives of the major institutions in a Romanian rural community (commune) - mayor, school principle and priest. The instrument used was the Structured Interview Guide, consisting of 27 questions, and a few additional, clarifying questions added during the interview (see Appendix 1).

The duration of interviews was 40'58" (school principle), 32'52" (mayor), and 32'03" (priest). The audio recordings resulted in 15 pages of transcript.

Content analysis was the method used to do the qualitative data analysis. Through the deductive approach (chosen given the limited time and resources available) and having the interview research questions as a basis, the information was categorized on themes, and similarities and differences were highlighted. The role of the current research was to pre-test the method and the instrument used - *Interview Guide*, presented in Appendix 1.

The research questions targeted four themes: current understanding of volunteerism concept, the institutional management of volunteer-based activities in the institutions represented by interviewees, the profile of volunteers in the community and the effects of volunteerism on sustainable development, as they are perceived by the three major formal leaders in a rural community. The answers were grouped on these four major themes and codes (key words and phrases) identified, leading to relevant messages for the theme of the research. The content of the main messages has been extracted from the transcript and these information were organized in a logical analysis frame. In the end, based on these information, the conclusions of the research were drawn out, especially the ones which offer clues related to the next logical steps of the research and the qualitative research overall.

The sampling method used for this pre-testing stage involved two criteria: the availability of the respondents and the condition that all of them come from the same commune, in order to obtain relevant results, which can be further used, from the perspective of research replication in other communes in Vaslui County.

3. RESULTS AND DISCUSSION

For the purpose of simplification, the questions from the interview guide have been grouped on the above – mentioned themes. Also, if the answers indicated several categories (sub-themes), these categories have been highlighted in the table (logic frame) used to organize the information.

3.1 Understanding the concept of volunteerism

This theme has been approached through questions 2 and 7 from the Interviewing Guide. The results are illustrated in Table 1, where for each of the respondents (mayor, school principle and priest), keywords and phrases (codes) from the transcript, as well as the frequency of their occurrence in the text, have been identified. The codes identified are presented in Table 1.

Table 1. Codes identified for understanding the concept of volunteerism theme

Theme/ Respondent	Mayor	School Principle	Priest
Understanding the concept of volunteerism	Unpaid, not forced, willingly, helps, the needy one, coaches.	Help, people who did good, good things, involved, poor children, let's do something, trust.	With no material interest, your time, you dedicate, help (2), didn't pay them, and stay beside them, out of kindness, cause, delicate situation, helpless.

The answers demonstrated that the concept of *volunteerism* is well understood by all the respondents, mainly aspects regarding lack of payment and willingness in putting oneself to the service of other people, offering some of the personal time to them. Examples of recent volunteer – based activities, given during the interview, have come to confirm the understanding of the concept. However, none of the interviewees mentioned that there is a legislative framework which regulates volunteerism.

Most of the volunteer – based activities organized at the rural community level are occasional and the beneficiaries are children coming from poor families, old people, and poor people. Most of the examples given are related to charitable activities for children and adults in need. As the priest summarized: "Volunteerism is a neologism, a lay name for a Christian deed you do for your neighbour."

3.2 Institutional management of volunteer – based activities

The questions subscribed to this theme were 1, 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 17, 19 and 20. The answers led to the identification of the following codes (Table 2):

Table 2. Codes identified for Institutional management of volunteer – based activities theme

Theme/ Respondent	Mayor	School Principle	Priest
Institutional management of volunteer – based activities	Development, budget, house holding, collaboration, not forced, thinking at their soul, good soul, involved, No daily frequency, administrative activities, charitable activities, educational activities.	Manager, organization, administration, joining, environment protection, charitable activities, you can do nothing on your own, together (2), to involve, well-established procedure, few times a month (2 – 3 time/ month), depending on the activity (2), list, we do not have a volunteers coordinator.	Leadership, administrative-financial, representation, preaching, they were not paid, Christian deed, cannot do everything on your own, occasional, helped (2), good deed, support them, we do not have a dedicated person (i.e. to work with volunteers), public conscience, results, collective emotion, solidary.

By analysing the codes, we could say that by nature of their position, the respondents identified the following as their major responsibilities: resources management, organization, coordination, offering leadership and institutional representation. None of the interviewees stated that they have an employed volunteers' coordinator. The persons who fulfil this responsibility are the interviewees (the leaders of the institution), and only in the case of Mayor's Office, the mayor mentioned he does that together with the Depute – mayor.

There is no planning, organization, monitoring, measurement or motivation system for volunteer – based activities. Only one institution (school) admitted it reports on the type of volunteer – based activities organized, number of volunteers and number of beneficiaries of volunteerism, to the county hierarchical institution.

Volunteer – based activities are occasional. Examples given included: environmental, charitable, and administrative activities, educational and social activities for vulnerable children and families with many children, old people, and community work.

Also, the frequency of volunteer – based activities is 2-3 times/ month, occasional, or, as the priest stated "we can count them with the fingers of our both hands" (within a year).

No evidence or records of the number of hours of volunteerism are kept. Volunteer – based activities are not measured/ quantified. However, material and

financial advantages of volunteers' work for the institutions were identified and recognized. For the community as a whole, the support offered by volunteers to needy people is an advantage (mayor).

There was no disadvantage in using volunteers' work, identified. The only one could occur from an *inappropriate strategy of working with volunteers* (therefore admitting that there should be a strategy). Here are a few of the most relevant answers:

- ✓ "We (i.e. the school) don't have a dedicated person for this job. This would mean having a maturity in volunteerism. We are in the pioneering stage. No one has been preoccupied to make the idea of volunteerism visible and implement it, over time." (School principle);
- ✓ "I haven't measured it and never thought of doing that... if I don't pay the volunteer, so he does that willingly, why should I measure?" (Mayor);
- ✓ "I haven't kept records of the number of hours of volunteerism. I also haven't thought about that. The volunteers stayed as long as it was needed. We do not want to demonstrate anything to anybody." (School principle);
- ✓ "In the rural area is very little present and barely visible (i.e. volunteerism)." (Priest);
- ✓ "To accomplish special things, you need an entire team. The bigger the number of volunteers, the higher the impact of things done." (Mayor)

3.3 Volunteer's profile

The answers offered to this theme led to the identification of 2 sub-themes: volunteer's profile (and characteristics of volunteerism), illustrated by the answers to questions 14, 15, 16 and 25, and motivation for volunteerism, related to questions 18, 21 and 22. The coding is presented in Table 3.

There were differences of opinion among institutions, related to the profile of the volunteer (age and gender). The mayor thinks the volunteers should be women, while the school principle and priest believe youth are more appropriate as volunteers. The agreement was on the moral features of a volunteer (persons with Christian moral, kind-hearted, who love people), level of education and time availability.

Regarding the characteristics of volunteerism, the words used were from the group of words which refer to emotional qualities: goodwill, love, honesty and the ones which refer to a certain behaviour of the individuals who get involved in volunteer activities: involvement, help, time, and team. From the motivational factors perspective, volunteerism starts from the desire of doing good and solve a problem (mayor), or it is perceived as an opportunity for young people to learn how to work in a team and cultivate certain skills, along with the desire of doing good, a Christian conscience and out of humanity (priest).

Table 3. Codes identified for community volunteer profile theme

Category/ respondent	Mayor	School principle	Priest
Volunteer's profile and characteristics of volunteerism	to love people, good-hearted person, woman, housewife, honest, an example for the women in the commune, hardworking, honesty, goodwill, hardworking person, be an example,	young people, intellectual, training, kind soul, desire to help, love, help, involvement	moral person/ Christian moral, being available, responsive, educated (a minimum level of education), to understand volunteerism, young people, time, team
Motivation	volunteerism = patriotic work	Desire to do good, need to solve a problem, satisfaction, desire to change things, desire to belong to a group.	Communication needs, learning how to work in a team, desire to do good, satisfaction, out of Christian consciousness, need to remedy an urgent situation, joy.

On a personal level, volunteerism emerges out of humanity, because is more difficult to do things on your own, due to the feeling of satisfaction and joy it generates, and also from the desire to offer an example to the rest of community members, which is a strength identified in the research. All of the respondents are formal leaders in the community and they must offer a good example, a role model to the community members.

The school and church representatives stated the following in their answers:

- ✓ "Anyone can be a volunteer, if he/ she is suitable for the activity, the moment and what it is requested from him/ her." (School principle)
- ✓ "I think young people are more attracted, because they have a native, sincere kindness of the age and of the soul, and I think we could form a group (i.e. of young volunteers)." (Priest)

3.4 Effects of volunteerism on sustainable development

The questions addressed aimed at establishing whether the social and economic value of volunteerism are being perceived by respondents (questions 23, 24, 26 and 27), along with the ones related to the future of volunteerism in the community and in general. We have considered that the identification of the effects is closely connected to the projection of this type of activities in the future. The main codes are included in Table 4.

Table 4. Codes identified for effects of volunteerism on sustainable development theme

Theme/ Respondent	Mayor	School principle	Priest
Effects of volunteerism	Future, moral, sustainability factor.	Information needs, involvement, more attention, training, organization, development, number of volunteers.	Need to nurture, promote, awareness, learning.

Respondents said it is beneficial for institutions to involve volunteers, because in this way the idea of volunteerism can be nurtured. The priest was sceptical regarding the development of volunteerism in the rural area, because the concept of volunteerism is not enough nurtured and the level of awareness is low. Volunteerism is perceived as a more suitable activity for big cities.

More information, thorough analysis and evaluation on the actual development stage of volunteerism is needed, so that volunteerism has a future. People need to be trained in order to be able to work with volunteers. In addition, according to the respondents, volunteerism cannot be done by people with a volatile (financial) situation.

Respondents talked about the effects of volunteerism, in the sense of increased community collective education level and the moral aspect (volunteerism beneficiaries know they are not left alone). The economic value of volunteerism was not identified, which is not surprising, considering that respondents have never thought of measuring the impact of volunteerism. The three interviewees told us the following:

- ✓ "I cannot properly organize volunteers, unless trained in this sense. It's the training regarding the concepts, the arguments, and the steps to be made." (Priest);
- ✓ "... without consistency, it's like a small light, which vanishes (i.e. volunteerism)." (School principle);
- ✓ "We need a culture of volunteerism, which doesn't exist, I think, in the Romanian context." (Priest);
- ✓ "…when you know you are lacking a lot of things at home, you don't think about volunteerism anymore." (Mayor)

4. CONCLUSIONS

Major conclusions drawn out from the content analysis, for this particular research, show the low level of volunteerism development in this Romanian rural community. In relation with the theme *current understanding of the volunteerism concept,* respondents could not identify the existent volunteerism structures at the community level, not even the ones they activate in, which is an

indicator of a very low level of awareness regarding the volunteerism concept. For example, all respondents are members in the Community Consultative Council, a community structure provided by the Romanian legislation, where it is clearly stated its members are volunteers. The concept of volunteerism is more understood at an informal level, and no references are being made to the legislative contextual framework based on which volunteerism activities are organized.

Highlights on the institutional management of volunteer-based activities in the institutions represented by interviewees indicated there is no formal management of volunteer activities at the level of the main three institutions in the rural community (Mayor's Office, School, Church), represented by the respondents. The answers did not indicate signs of strategic planning and organization of the volunteer – based activities. Volunteers are not seen as part of the institutional human resources.

No system for volunteerism activities measurement has been identified (e.g. number of hours of activities in which volunteers are involved). Only the school principle affirmed that the regular reports sent to the County Education Department include information related to the volunteer – based activities, number of volunteers involved and number of beneficiaries of the volunteer – based activities.

Talking about *the profile of volunteers in the community,* the answers from all institution representatives highlighted that the potential for volunteerism in the rural environment is seen as very low, and it is believed that volunteerism is more appropriate for the urban area, youth, financially secured individuals and non-governmental organizations (NGOs). It was agreed, though, that there is a need to increase social participation and volunteerism in rural communities. Answers pointed out that volunteerism cannot be developed in the absence of information campaigns and proper training regarding the Romanian legislation (Law of Volunteerism) and volunteers' management processes.

Speaking about *the effects of volunteerism on sustainable development,* respondents said there might be a relevant relationship between volunteerism and community sustainable development, only if the number of volunteers reported to the entire population of the community, will increase. There needs to be a critical mass of volunteers to be able to talk about a substantial, sustainable impact on community development. Currently, all three community formal leaders indicated a small number of active volunteers – 10-15 people, compared to a commune population of 3, 200 inhabitants.

The social value of volunteerism is being identified, especially considering the nature of activities in which volunteers are involved (charitable activities, educational activities, direct support offered to needy people) and the people who benefit of volunteers' support (poor children and adults, old people lacking caring). However, the responses revealed the added value that volunteerism

brings at the community level, and seen as a collective educational factor. The social value of volunteerism was recognized (indirectly), but not the economic value of it.

Research's implications

The most obvious consequences of the research relate to the need to design and carry on programs and projects aiming at raising the awareness and information level regarding the importance of volunteerism, targeting the large public, along with Volunteers Management courses which must be designed for the use of public institutions leaders and managers, formal and informal leaders in a rural community, adapted to the specifics of volunteer – based activities in the rural area. These courses need to be accessible, in terms of concepts and terms used and to intentionally include practical tools to measure the economic and social impact of volunteerism.

ACKNOWLEDGEMENTS

The author wishes to address special thanks to the three leaders from the commune in Vaslui County – the mayor, the school principle and the priest, for graciously offering some of their time to answer, honestly and openly, to the research questions.

References

1) Civil Society Development Foundation, (2017). *Romania 2017. Nongovernmental sector: profile, trends, challenges (România 2017: Sectorul non-guvernamental: profil, tendințe, provocări.).* [online] Available at: http://www.fdsc.ro/library/files /romania-2017.pdf [Accessed 17.07.2017].
2) Emergency Ordinance no. 25/2004 for the modification and completion of Government Ordinance no. 88/2001 regarding the setting-up, organization and functioning of community public services for emergency situations, published in Official Gazette no. 391/03.05.2004.
3) Emergency Ordinance no. 191/2005 for the modification and completion of some norms regarding the setting-up, organization and functioning of community public services for emergency situations, published in Official Gazette no. 1189/29.12.2005.
4) Government Ordinance no. 88/2001 regarding the setting-up, organization and functioning of community public services for emergency situations, published in Official Gazette no. 544/01.09.2001.
5) Haddock, M. and Devereux, P. (2015). Documenting the Contribution of Volunteering to the SDGs. *Forum Discussion Paper 2015,* [online] Available at: https://forum-ids.org/2015/12/forum-discussion-paper-2015/ [Accessed 18.09.2017].
6) Huiting, W. (2011). *Social Impact of Volunteerism.* Points of Light Institute [online] Available at: http://www.pointsoflight.org/sites/default/files/site-content/files/ social_impact_of_volunteerism_pdf.pdf [Accessed 19.08.2017].

7) Institute of Development Studies, (2015). *The Role of Volunteering in Sustainable Development.* [online] Available at: https://www.vsointernational.org/sites/ default/ files/the_role_of_volunteering_in_sustainable_development_2015_vso_ids.pdf [Accessed 31.10.2017].
8) International Labour Office, (2011). *Manual on the measurement of volunteer work.* Geneva: International Labour Office.
9) Law 272/2004 regarding the protection and promotion of children's rights, published in Official Gazette no. 159/05.03.2004.
10) Law 195/2001 Law of volunteerism, published in Official Gazette no. 206/24.04.2001.
11) Points of Light Foundation and Volunteer Centre National Network, (2004). *Volunteering in Under-Resourced Rural Communities. Final report.* [online] Available at: http://www.resourcesharingproject.org/sites/resourcesharing project.org/files/files-resources-ruralcommunities.pdf [Accessed 15.06.2018].
12) Rieffel, L. (2015). *Sustainable development needs organized volunteers.* [online] Available at: https://www.brookings.edu/blog/future-development/2015/09/30/ sustainable-development-needs-organized-volunteers/ [Accessed 02.09. 2017].
13) United Nations Economic and Social Council, (2016). *Report of the Inter-agency and Expert group on Sustainable Development Goal Indicators (E/CN.3/2017/2). Annex III. Revised list of global Sustainable Development Goal indicators.* [online] Available at: https://unstats.un.org/unsd/statcom/48th-session/documents/2017-2-IAEG-SDGs-E.pdf [Accessed 15.08.2017].
14) UN Volunteers, (2016). *Annex 4 – UNV Discussion Paper "Volunteering as Essential in achieving Sustainable Development". UNV Responding to the 2030 Agenda.* [online] Available at: http://www.undp.org/content/dam/undp/library/ corporate/Executive%20Board/2016/Annual-session/dp2016-15_Annex%204.pdf [Accessed 15.08.2017].
15) VOLUM Federation, (2016). *The importance of measuring the social and economic impact of volunteerism in Romania. Position Document (in Romanian).* [online] Available at: http://federatiavolum.ro/documente-volum/ [Accessed 15.03.2018].

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Appendixes

Appendix 1. Interview Guide

1. Which are your major responsibilities within the institution you are representing?
2. What do you understand by „volunteerism"?
3. Have you asked for volunteers 'support, when you organized different kind of activities in the community?
4. What are the reasons for asking/not asking for their support?
5. What is the frequency of volunteer – based activities organized?
6. In what kind of activities are volunteers usually involved?
7. Can you tell us of a recent activity which involved volunteers? - detailed
8. Who is in charge with volunteers 'recruitment in your institution?
9. Who is in charge with volunteers 'coordination in your institution?
10. Is the contribution of volunteers mentioned in the regular reports of your institution?
11. How do you keep record of the number of hours of volunteerism? Who does that?
12. Have you ever measured the volunteerism contribution to the overall results of your institution? If *yes*, how did you do that?
13. Within the context of the actual labour force crisis, do you think volunteerism should be encouraged? If *yes*, which are the departments in your institution where volunteers 'support is needed?
14. Can you describe the volunteers in your community (gender, age, education, character traits)?
15. Which are the features of a person who does volunteerism?
16. Do you think volunteerism is important, and if *yes*, in what way?
17. What measures would you take to increase the number of volunteers in your commune?
18. In your opinion, what is the motivation of people who chose to become volunteers?
19. Which are the advantages of using volunteers work for your institution? And for the community overall?
20. Which are the disadvantages of using volunteers work for your institution? And for the community overall?
21. Have you ever been involved as a volunteer in community activities? Can you describe an activity in which you participated as a volunteer?
22. How did you feel like as a volunteer?
23. What do you think about institutions who involve volunteers in their activities?
24. What is your opinion about the future of volunteerism?
25. Which are the first three words you can think of when you think about volunteerism?
26. What is the connection between volunteerism and sustainable development? Please explain.
27. If there's something else you wish to add…

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ASPECTS REGARDING THE PROTECTION OF EMPLOYED WOMEN. COMPARATIVE LAW ELEMENTS

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Abstract
Both women and young people are considered vulnerable and require a special protection regime. Roman law assigns an important part to the conferring of these rights. The present article analyzes briefly the elements of protection of employed women, but basically draws out comparative law elements and indicates a series of proposals for legislative improvements.
Keywords: *employed women; comparative law; labour law.*
JEL Classification: K31, J78

1. INTRODUCTION

Women the same like young people are considered to be a vulnerable category that needs a special protection regime because women are more at risk of poverty and social exclusion than men (Agenția Europeană pentru Securitate și Sănătate în Muncă, 2018). Vulnerability in this context is used from the point of view of lack of means of defense. Also women have a higher probability of experiencing certain risks (Agentia Națională pentru Egalitatea de Șanse între Femei și Bărbați, 2018).

Women are considered to be a vulnerable group, primarily because of lower female employment rate than that of men (58.6% women, 70.7% men), despite the fact that women have a higher level of education (on average , 60% of EU higher education graduates are women). First of all, many women work part time: more than 30%, compared with 8% for men. Unfortunately, women are paid less than men: about 18% less for each hour worked. At the same time, the risk of poverty is higher for women than for men: 17.1% of women are poorer compared to 15.3 % of men.

Women are under-represented in decision-making roles in the economic or political sphere, despite the fact that they have a high share in these areas. Last but not least, women are quite a victim of violence and trafficking.

The National Development Plan states that "the risk of social exclusion is more pronounced among women than men at all stages of life as a reflection of their low participation in the labor market. This risk of poverty and of single

parents having growing children, among them the predominant group being women" (Popescu, 2011).

There are a series of legislative packages that regulate the situation of women and can be classified in several areas: normative acts that legislate on equal treatment of women and men, protection of maternity at work, anti-discrimination, health and safety legislation. These normative acts are in line with the legislation in the field at European level (Steliana Doseanu, 2015).

2. PROTECTION OF EMPLOYED WOMEN IN THE ROMANIAN LAW

Women who work and are insured in the health insurance system benefit from maternity leave and maternity allowance.

Pregnancy, lactation leave and maternity allowance are given within 126 calendar days. Equal rights also have women who no longer work, for reasons beyond their control, if they give life to a child within 9 months of the date when they were no longer insured.

Pregnant pregnancy is 63 days before birth, and leave of birth is 63 days after birth, but there is a possibility of compensation between them, with mandatory 42 days of junior leave.

Women who have a disability and who are insured can receive pregnancy leave on request from the 6th month of pregnancy (Rotman, 2011).

Pregnant workers, mothers, teens or nursing mothers have a number of rights. Of these, we mention the Employee's Right to Leave for prenatal consultations during the work program with a maximum of 16 hours / month, without lowering the salary. Another right is not to be forced to perform work that could affect their health or pregnancy or the newborn, as the case may be. We also remind the employee of the right to benefit from changes in working conditions and / or working hours, the Employee's right to the employer to keep confidential about his or her pregnancy status, etc.

Paid women who have given birth must inform their employer and submit their medical certificate within 6 months of the date they were born.

Employers' obligations towards pregnant women employees derive from prohibiting employers to terminate employment with certain situations. So, firstly, they can not stop labor contract pregnant women who gave birth recently, nursing, for reasons unrelated directly with his condition (Țiclea, 2011).

A second case, the employee who is on maternity leave, the ban may only appear once in the first 6 months after the employee returns to work (Cernat, 2014).

Third, an employee who is on parental leave for up to 2 years or 3 years, as is the case with a disabled child and fourth, the employee who is on leave for the

care of the sick child up to the age of 7 or the disabled child under the age of 18 years.

Failure to respect maternity protection rights at work is the subject of the offense and is sanctioned. According to art. 27 par. 4 of the Labor Code, the employer has no right to ask for pregnancy tests during the employment period. This norm is in line with international standards aimed at protecting women against abuse and discrimination.

According to art. 60 of the Labor Code, the employer is forbidden to dismiss pregnant women if he was informed of the pregnancy before taking the decision to dismiss.

In general, there is often an attitude of rejection of employers regarding employment of married woman, because of their ability to get under the legal provisions referring to maternity protection, provision considered by employers burdensome (Dacian, Chiciudean and Emrich, 2012).

3. COMPARATIVE LAW ASPECTS ON THE PROTECTION OF EMPLOYED WOMEN IN EU MEMBER STATES

Labor law in the ***United Kingdom*** stipulates that pregnant workers have 4 main legal rights: paid time for care before birth, maternity leave; maternity allowance; protection against unfair treatment, discrimination or dismissal.

"Pregnancy Care" is not just medical appointments, it can also include prenatal or parental classes if recommended by a doctor or a midwife. (Feikert, 2008)

Employers can not change the terms and conditions of the contract to a pregnant employee without their consent, otherwise the contract will be breached.

Employers must give pregnant employees free time for prenatal care and pay them normally for this free time. The father or partner of the pregnant woman is entitled to an unpaid working time to go to 2 appointments before birth (GOV.UK, 2018).

Maternity leave and maternity allowance will automatically begin if the employee leaves the workplace for a pregnancy-related health problem within the last 4 weeks of pregnancy, no matter what has been agreed before.

The employee must inform the employer of the pregnancy at least 15 weeks before the child is born.

If this has not happened (for example, she did not know about pregnancy), the employer should be informed as soon as possible.

The employee must also tell the employer when they want to start their maternity leave.

From the moment the employer knows that the employee is pregnant, she has to assess the risks to which the woman and the fetus are exposed.

Risks could be caused by: lifting or transporting weights; stand or down for long periods without adequate breaks; exposure to toxic substances, many hours of work.

In ***France***, under Article L1225-7, a pregnant employee may be temporarily assigned to another job on her own initiative or that of the employer if the medical condition so requires.

In the event of disagreement on the part of the employer, or misunderstandings between the employee and the employer, only the occupational health practitioner may determine the medical necessity of changing the job and the employee's ability to cope with the new job.

The assignment to another facility is subject to the consent of the applicant. Temporary assignment can not exceed the duration of pregnancy and ends when the woman's state of health allows her to recover her initial job.

This change does not cause any wage decline.

It is also stipulated that the employee medical certificate of pregnancy or birth, working at night may change, upon request, in a day job during pregnancy and during postnatal leave.

It is also necessary to occupy a day job during her pregnancy when the work doctor notes in writing that the night shift is incompatible with her condition. This period may be prolonged for postnatal leave and after returning from maternity leave for a period not exceeding one month when the physician records in writing that the night shift is incompatible with her condition.

Other changes are subject to the employee's agreement. Changing the program does not cause any wage decline.

The employee has a guaranteed income during the period of suspension of the contract of employment consisting of the daily allowance provided for in Article L. 333-1 of the Social Security Code and an additional allowance paid by the employer calculated on the same basis as provided for in Article L. 1226- 1, except for seniority.

Article L1225-12 provides that the employer offers an employee whose job involves exposure to specific risks by regulating another job in accordance with his condition when there is a medical certificate of pregnancy.

Article L1225-16 provides that employees are entitled to leave to go to the medical examinations required under Article L. 2122-1 of the Public Health Code as part of the medical monitoring of the pregnancy.

The spouse of a pregnant woman or in a union linked to her through a civil procedure or living with her also benefits from an absence of leave for three of the visits required for medical examinations.

These absences do not involve pay cuts and are treated as an actual work period to determine the length of paid leave as well as the legal or contractual rights acquired by the employee as regards his seniority in the company.

Under Article L1225-17, the employee is entitled to maternity leave for a period starting six weeks before the probable date of birth and ending ten weeks after that date.

In ***Germany,*** during pregnancy and after, women (parents) are more protected at work, they benefit from additional services from the health insurance house. The Constitution protects future parents for the next stage of their lives.

On women waiting for a child, the state protects them in particular. The most important laws on this are contained in the "Mutterschutzgesetz" (Bundesministerium der Justiz und fur Verbraucherschutz, 2018). In the first instance, the employer must be notified immediately after the confirmation of the pregnancy.

During the pregnancy and the first four months after birth, employees with an indefinite contract are protected against dismissal. If, however, a dismissal decision is received but the employer has not been notified in advance, the woman will have to prove the pregnancy by a doctor's document within a maximum of 2 weeks. If the employer does not withdraw her decision, she may be sued in the courts within a maximum of 3 weeks and the institutions to which she will be able to complain are: Arbeitsgericht or Gewerbeaufsichtsamt.

Dismissal of a woman during pregnancy until four months after the 12th week of pregnancy and up to the fourth month of her birth is not allowed if the employer was known or notified at the time of termination within two weeks from receipt of the notification. Exceeding this term is not a big problem if it can be documented.

Pregnant women are not allowed to work if their health or their child is endangered, and can prove this through a physician's document. It is also forbidden to carry out heavy work or to endanger health. Six weeks before birth pregnant women are forbidden to work. Exceptions can be made if work is to be continued, and this is not an effort. After birth, the ban period is 8 weeks in the case of term deliveries or 12 weeks in the case of pre-term birth or twins.

Under the Women's Protection Act, women who are not fully effective in the first months after birth, as showen by medical evidence, can not be exploited for their work-related performance (Federal Ministry for Family Affairs, Senior Citizens Women and Youth, 2016).

Paragraph 3 of the same law provides that nursing mothers should not be exploited. Nursing mothers should be able to leave an hour a day, at their request, for breast-feeding, but at least twice a day for half an hour or an hour at a time. In a continuous working time of more than eight hours, at the request of two times rest for at least 45 minutes or when the workplace is not in the vicinity of the house, even a lactation given for at least 90 minutes. Work is considered to be continuous unless it is interrupted by a break of at least two hours.

According to the present law, the granting of the lactation period should not lead to a decrease in the salary. Breastfeeding should not be a problem for

nursing mothers or, however, the conditions laid down in the Working Hours Act or other regulatory breaks must be taken into account.

Pregnant women and nursing mothers can not do overtime, they can not be hired at night at 20pm-6am and on Sundays and holidays.

Exceptions may be made to extend the work schedule for each woman under 18 for 8 hours a day or 80 hours for two weeks, and for other women over 18 years of age 1/2 hours a day or 90 hours per second weeks will be paid. Sundays are included in two weeks.

In the field of transport, for the reception of guests and public houses and the care of some households in the household, in health care and in bathhouses, with music performances, theater performances, other performances, performances or festivities can be attended by nursing mothers, subject to of paragraph 1 on Sundays - employed and legal holidays if they even have a rest period of at least 24 hours after a night of rest is given each week.

For office, home or treatment, pregnant or breastfeeding workers can only work from home so they can be released so that the employer does not need to provide a place for breastfeeding. The supervisory authority may lay down detailed rules on workload in individual cases.

The insurance pays basic checks for mother and child. Checks that exceed or are required by parents will have to be paid out of their own pocket. Pregnant people receive medication without having to pay if they are needed to prevent or treat some difficulties in pregnancy or childbirth. The insurance house pays the cost of birth, as well as hospitalization.

Through ***Elterngeld,*** the German parental allowance helps parents and young families. The right to parental allowance is given by parents who want to support their children for the first 14 months of their life. So they do not need state assistance (grown up).

Who receives the parental allowance? The right to parental allowance is: Employees, civil servants, self-employed workers, unemployed or non-working parents, students. Apart from natural parents and adoptive parents, this allowance can also be granted to relatives up to Grade 3 (grandparents or aunts / uncles).

Allowance conditions refer to parents who grow up and assist newborns after birth, those who do not work for more than 30 hours per week, also refer to parents living with children living in the same dwelling and the right to settle.

Future parents who are in a work contract are entitled to parental leave for up to 3 years. It can be flexibly formatted. Parents are entitled to 24 months of leave between year 3 and 8 of the child's life.

Every parent has the right to take this leave in 3 stages. Employer approval is not required, however, it may refuse the application for parental leave in case of urgent need or may negotiate another term for it.

4. CONCLUSIONS

We find that in the member states of the European Union there has been and has long since been paid attention to the protection of women at work. In the vast majority of analyzed countries, including Romania, the standards of protection of women are harmonized. We find a series of regulations that are almost identical, with little difference.

Thus, it is noted that all legislators at both European and national levels have taken special care to regulate the specific situation of the pregnant woman in the workplace, taking care to have and to respect a number of rights, we consider fundamental, both for the future mother and baby. Rights such as the prohibition of the termination of the contract by the employer, the right to maternity leave, the right to reduced working hours, the right to no longer perform the night work and here the obligation is for the employer to offer her another program post only the day, the right to allowance during the period of suspension of the contract etc are found in all the laws.

In our study we find that despite the fact that there are small discrepancies in the legislation of England, France and Germany women and young people are considered also to be vulnerable groups; so, therefore there are specific rules and regulations in these countries for these categories of people in society.

References

1) Agenția Europeană pentru Securitate și Sănătate în Muncă, (2018). *Femeile și sănătatea și securitatea la locul de muncă.* [online] Available at: https://osha.europa.eu/ro/themes/women-and-health-work [Accessed 15.03.2018].
2) Agenția Națională pentru Egalitatea de Șanse între Femei și Bărbați, (2018). *ANES* [online] Available at: http://anes.gov.ro/ [Accessed 18.03.2018].
3) Bundesministerium der Justiz und fur Verbraucherschutz, (2018). *Gesetz zum Schutze der arbeitenden Jugend (Jugendarbeitsschutzgesetz - JArbSchG)* § 22 Gefährliche Arbeiten. [online] Available at: https://www.gesetze-im-internet.de/jarbschg/__22.html [Accessed 22.03.2018].
4) Cernat, C. (2014). *Dreptul muncii.* 5th ed. București: Universul Juridic.
5) Dacian, D., Chiciudean, R. and Emrich, G. (2012). *Dreptul muncii.* [online] Cluj-Napoca: Universitatea Babeș-Bolyai. Available at: http://www.apubb.ro/wp-content/uploads/2011/02/Dreptul-muncii-2011.pdf [Accessed 16.03.2018].
6) Federal Ministry for Family Affairs, Senior Citizens Women and Youth, (2016). *Family Affairs, Senior Citizens Women and Youth.* [online] Available at: https://www.bmfsfj.de/bmfsfj/meta/en/en/the-ministry/112048 [Accessed 12.03.2018].
7) Feikert, C. (2008). *Children's rights: United Kingdom (England and Wales).* [online] Library of Congress. Available at: https://www.loc.gov/law/help/child-rights/uk.php [Accessed 24.02.2018].
8) GOV.UK, (2018). *Pregnant employees' rights.* [online] Available at: https://www.gov.uk/working-when-pregnant-your-rights [Accessed 22.02.2018].

9) Labor Code (republished) Law no. 40/2011 published în OJ, Part 1, no. 225, from 31 March 2011.
10) Popescu, R. (2011). *Grupuri vulnerabile și economia socială. Romi și femei în dificultate, manual de intervenție*. București: Expert Publishing House.
11) Rotman, A. (2011). *Dreptul muncii*. București: Universitatea Hyperion.
12) Steliana Doseanu, L. (2015). *Reglementarea muncii tinerilor și femeilor în dreptul național și european*. București: Universul Juridic.
13) Țiclea, Al. (2011). *Tratat de dreptul muncii*. București: Universul Juridic.

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THE FINANCIAL NATURE OF THE MARKET OF VOLUNTARY MEDICAL INSURANCE IN THE COUNTRIES OF THE EUROPEAN UNION

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Abstract
Within the framework of this article, it is advisable to consider trends and mechanisms for reforming health systems that are key elements in achieving success.
The review of national health models of the EU countries shows a rather wide range of possible approaches to financing, organising and providing medical care.
While expectations related to health care systems are growing, and cost justification is constantly being questioned, governments need to find the answer to the cardinal question: what is the most appropriate way to finance our health care?
As a rule, not one country has only one net source of income. Historically, most countries in Europe have developed primary financing systems of health care, either from the budget or through health insurance. To a greater or lesser extent, the primary health financing system is being developed in the presence of other forms.
Currently, all existing health systems are reduced to three main economic models. These are: paid medicine, based on market principles using private health insurance, state medicine with a budgetary financing system and a health system based on the principles of social insurance and market regulation with a multi-channel financing system.
It is interesting to note that the principles of insurance medicine in most countries of the world still dominate both completely private and fully public funding.
The corpus of data on the impact of various methods of financing is growing. The present study explores ways to mobilise revenues and the consequences of choosing a funding mechanism or a combination of mechanisms. Different mechanisms are evaluated on the basis of various criteria, one of which is the impact on social justice. Do we want to put a paying heavy burden on the poor and the sick? Existing evidence suggests that the mobilisation of revenues for health market mechanisms are limited. Privatisation can lead to the violation of the principles of social justice and equal access to services: private health insurance is very regressive, and user charges are a gross political tool.

The purpose of our study is to analyze the nature and characteristics of the market for private (voluntary) health insurance in the European Union in terms of market structure and financing functions.
Keywords: *health system; market; voluntary medical insurance; financing; income; health models.*
JEL Classification: K15, K32

1. INTRODUCTION

In most European countries, healthcare is funded by a mix of audiences and private sources with a dominant role for the former. Because of it the domination of statutory coverage, funded by compulsory health insurance tax contributions and / or income, is considered to be voluntarily insured by health insurance an additional method of financing healthcare. Taking into account the global problem a trend of increasing demand for health care services and public constraints funds, policymakers are obliged to consider expanding additional roles private methods of financing healthcare, such as voluntary health insurance.

We define Voluntary Health Insurance (VHI) as health insurance that is taken up and paid for at the discretion of individuals or employers (including the state as employer) on behalf of individuals.

It should be emphasized that the role and possibilities of developing voluntary health insurance is mainly determined by statutory health coverage. In the international literature are three main types of voluntary health insurance distinguished according to its function in the health system.

The role of VHI in a given health care system directly affects the size of the market and the percentage of population covered, however other institutional, economic and cultural factors cannot be ignored, when the current situation and development possibilities for VHI markets in Europe are discussed.

The aim of the paper is to present the importance and the share of voluntary health insurance in health care financing systems in European countries as well as to provide an overview of European markets for health insurance. The current trends in the health insurance sector and challenges for its future development are also addressed.

2. CLASSIFICATION OF VHI TYPES

As applied to EU countries, VHI is a commercial method of social protection of target populations. In the context of EU countries, VHI is divided into three types (Couffinhal, 1999):

- *substitutive health insurance* – provides coverage for people excluded from or allowed to opt out of the public system (e.g. Austria, Germany, the Czech Republic, Estonia, Portugal);
- *complementary health insurance* – covers services excluded or not fully covered by the public system, including cover for statutory user charges (e.g. France, Belgium, Denmark, Slovenia, Latvia);

- *supplementary health insurance* – provides supplementary cover for faster access and increased consumer choice (e.g. Ireland, Poland, Romania, Spain, the UK).

These types of private medical insurance also differ in the way of calculating premiums (according to individual, group or public risks), by the method of determining benefits and by the status of providers of insurance services (commercial and non-commercial insurers).

Substitutive VHI serves as an alternative to public insurance; provides insurance coverage for citizens who have withdrawn from the state insurance system. Access to substitute VHI is determined primarily by the amount of income (usually $ 100,000 and above, for 10% of the population). At the same time, the prices for services provided by VHI are about 1/3 higher than the prices for public health services (World Health Organization, 2004, p. 208).

Complementary VHI fully or partially covers services excluded from the state financing scheme. It is available to all citizens of EU countries, although in different forms.

As a rule, complementary insurance is a joint payment for medicines, expenses for the services of doctors and auxiliary primary care medical personnel, secondary care physicians, as well as expenses for services excluded from the package of benefits and benefits financed by the public health service. At the same time, compensation levels may vary depending on the country, and depending on the insurance package chosen.

Supplementary VHI expands the consumer choice and traditionally guarantees accelerated access or expanded consumer choice, and in some cases increases the choice between suppliers.

It should be noted that the line between complementary and supplementary VHI is not always distinct; these two forms may overlap. The market for substitutive insurance allows for more active government intervention. The market for complementary and supplementary insurance is relatively weak.

Over the past 20 years, there has been no sustained growth in demand for VHI services in EU countries (OECD, 2000).

By the latest Eurostat Information The share of government schemes and compulsory contributory health care financing schemes expenditure in total current healthcare expenditure was in excess of 80.0 % in the Netherlands, Luxembourg, the Czech Republic, Sweden, Denmark and Germany (where the highest share was recorded, at 84.5 %), as well as in Iceland and Norway (which reported a share that was above that registered in any of the EU Member States, at 85.4 %) (Eurostat, 2018).

Compulsory contributory health insurance schemes and compulsory medical saving accounts (which are generally part of the social security system) accounted for three quarters or more of overall spending on healthcare in Germany (77.9 %), Slovakia (75.4 %) and France (75.0 %) in 2015, but less than

5.0 % in Spain, Portugal, Cyprus, Italy, Ireland, the United Kingdom, Denmark, Latvia and Sweden. By contrast, the United Kingdom (79.5 %), Sweden (83.7 %) and Denmark (84.1 %) reported that government schemes accounted for more than three quarters of their total current expenditure on healthcare, while shares of 65.0-75.0 % were registered in Portugal, Spain, Ireland and Italy (Eurostat, 2018).

Another major source of healthcare funding was household out-of-pocket payments, whose shares peaked in Bulgaria (47.7 %), Cyprus (43.9 %) and Latvia (42.1 %), while household out-of-pocket payments also accounted for more than one third of total healthcare expenditure in Greece in 2015. France (6.8 %) was the only EU Member State where household out-of-pocket payments accounted for a single-digit share of healthcare expenditure, while there were seven other Member States that recorded shares within the range of 10.0-15.0 % (Eurostat, 2018).

Voluntary health insurance schemes generally represented a small share of healthcare financing among the EU Member States in 2015; their relative share peaked at 14.5 % in Slovenia, while double-digit shares were also recorded in France (13.6 %) and Ireland (12.3 %), while the next highest share for this source of funding was recorded in Croatia (8.0 %). There were seven Member States where voluntary health insurance schemes provided less than 1.0 % of the finance for healthcare expenditure in 2015, with the lowest share recorded in the Czech Republic (0.1 %).

Partly this is due to the fact that states continue to provide comprehensive insurance benefits (recall that participation in the state insurance scheme is mandatory for citizens of most EU countries). In part, this is due to the efforts of states to introduce methods other than VHI for shifting costs to the consumers (among such methods are direct charges from patients - consumers of medical services).

The EU data show that even where governments specifically encourage people to apply for private insurance services, the results on VHI do not lend themselves to unambiguous interpretation. The share of VHI coverage is highest in France, but insurance cover is provided mainly through joint payments (OECD, 2000).

Recent changes in E.U. regulation, culminating in the 1994 third non-life insurance directive, have led to the creation of a single market for VHI in the European Union. In an attempt to increase competition and consumer choice, this directive abolished national controls on VHI premium prices and policy conditions. Although E.U. member states may invoke the "general good" to justify national regulation under certain conditions, guidelines regarding the general good are vague and open to interpretation. What this means in practice is that the market for VHI in the European Union has been liberalized and deregulated to the extent that governments can intervene only where VHI acts as

a substitute for statutory health care (Germany, the Netherlands, and Spain). Such substantial deregulation poses interesting challenges for national regulators, particularly if VHI is to expand in the future.

The relatively modest nature of VHI markets in the countries of Central Europe has traditionally been attributed to the generosity of government benefits. The VHI coverage remains low in the southern EU countries, including Greece, while individual payments to suppliers in these countries are often very high. In Germany, the proportion of VHI is not as high as one would expect; this can be explained by the high level of public spending (and the comprehensive nature of government benefits and benefits), as well as the high cost of LCA (Busse, 2000).

One of the main reasons is the unwillingness to pay the insurer - the "third party". If people are used to paying their doctor or hospital directly, transferring money to a "third party" may seem unnecessary in the relationship "patient-doctor". This element of cultural tradition undoubtedly influences the spread of VHI in the countries of Central and Eastern Europe with a high level of direct payments.

3. FEATURES OF THE ECONOMIC MODEL OF VHI

To underline the economic model of the VHI market means to understand and define "goods". Thus, medical services in VHI are considered as a private good, i.e. ordinary goods, which can be bought or sold in accordance with the classical laws of the market (Comite Europeen des Assurances, 2000).

The range of medical services is a wide range of services, which can be described as a comprehensive (full) health and life insurance in various options. Availability of medical services is limited by the solvency of patients or employers. There is a free choice of the policy and the volume of purchased services. State regulation of prices for medical services is difficult. The price is formed as a result of an agreement between the patient, the insurer and the health facility. The costs of determining the level of risk, processing and confirmation of accounts can be significant. Certain powers to control contributions and efficiency of spending are owned by private insurance companies. Insurance guarantees are determined by the obligations reflected in the contract (Datamonitor, 2000).

In the classical market, the patient buys medical services at market prices, choosing any manufacturer that suits him. Making this purchase, he is guided by his own considerations about the value for him of this purchase. His choice will be determined by the price of the services. The lower the price, the more services the patient is willing to pay (World Health Organization, 2001, p. 224; World Health Organization, 2002, p. 165).

With increasing demand for any services, manufacturers increase the number of services produced and simultaneously raise prices. But buyers react negatively to this. Demand is falling, producers are starting to reduce prices.

At some point at a certain price the number of services offered and purchased is the same. This point is called an equilibrium point. It is unstable, as producers continue to raise prices, demand begins to fall, the market emerges from the equilibrium point, to return to it after a while. Thus, in the classical market, prices and the number of services offered fluctuate around the equilibrium point (Исакова and Шейман, 1993).

Such a model is an unattainable gold standard. Indeed, everyone can get any medical services without any queue and at the prices for which they can buy these services.

Unfortunately, such a model operates only on ideal markets, for which the following conditions must be observed (Datamonitor, 2000):

- certainty;
- full knowledge;
- freedom of consumers from advice of doctors with their own interests;
- the market has a large number of small producers.

Certainty means that the consumer knows exactly what services he needs and the exact quantity of them. This is extremely rare in the market of medical services, except in relation to preventive services. Since medical services are a "negative" product, it is acquired only in the event of a disease, and this happens, as a rule, unexpectedly and unexpectedly.

The ideal market assumes that the buyer has a complete understanding of the consumer properties of the product. With regard to medical services, this means that the patient accurately assesses his or her health status, knows what health services are needed and what changes will result from the provision of the service. Obviously, such knowledge of the patient is impossible in the healthcare sector.

The ideal market assumes that the buyer makes a decision freely, without external influences. A different picture in health care. For medical services, the patient seeks a doctor who is, unlike a patient, a medical professional. It is the doctor who determines both the number and set of medical services purchased by the patient.

In order for the ideal market to function, small producers should appear and go out under it, influenced by changes in demand and prices.

But "doctoring" always required profound special knowledge, and these same professionals became doctors to certify this knowledge (license). Thus, they were able to restrict access to the market for new producers. In addition, as a rule, doctors work in large institutions, which further limits the freedom of small producers.

So, in the sphere of medical services, the ideal market does not work. Thus, the "gold standard", provided by an ideal market, in health care is unattainable (Isakova and Sheiman, 1993).

4. THE REAL MARKET OF VHI IN EU

Although the ideal market is very attractive (in fact, with such a model, the behavior of individual small producers allows society without the big overheads to purchase the necessary services at an optimal price) we must analyse the real market of VHI.

The real VHI market is represented by a developed system of private medical institutions and commercial medical insurance, where doctors are sellers of medical services, and insurers are their buyers. Such a market is the closest to the free market and has all its advantages and disadvantages (Emmerson, Frayne and Goodman, 2001).

Because of the acute competition, conditions are created for the growth of quality, the search for new products and technologies, the rigid rejection of economically inefficient strategies and market participants. This determines the positive aspects of the market model of insurance.

However, on the other hand, the inadequate consideration of the specifics of the commodity in question (unlimited demand for medical services, seller's monopoly, etc.) causes certain negative aspects. These include:

- excessive growth of medical costs;
- difficulties in exercising state control;
- stimulating the supply of unjustified services;
- preconditions for unfair methods of competition;
- excessive influence of fashion and advertising;
- unequal access to health care.

The market model of the financing system organising is one of the most qualitative, but at the same time, one of the most expensive models. From the economic point of view, this model is inefficient, requiring a cost overrun. In addition, in the healthcare system organized on market principles, social guarantees for the population in obtaining medical services are not provided. The market model does not have the property of accessibility for all strata of its citizens. There is also extreme unevenness in the consumption of medical services, which is closely correlated with income differentiation. So, in 1990, 70% of all medical services received in the VHI market in the EU countries accounted for 10% of the population with high incomes (Saltman, Busse and Figueras, 2004, p. 313).

The market of medical services has the following characteristics (Isakova and Sheiman, 1993):

- risk and uncertainty;
- inefficiency associated with the activities of many small insurers;

- excessive consumption of medical services and selection of risks;
- asymmetric distribution of information between the patient and the doctor.

So, all the insured have an equal risk of getting sick. However, in real life, the older a person is, the more risk for him to fall ill, in addition, the risk depends on the profession, the presence of chronic diseases or predisposition to them. Therefore, a selection of risks takes place in the private VHI market.

Private markets involve in the process of health insurance a lot of small insurers, whose activities also require costs; there is inefficiency due to small scale of insurance organizations.

In private health insurance systems, there is a problem of unjustified consumption of medical services, known as "moral costs". Moral costs are of two types - the moral costs of the patient (consumer) and the moral costs of the doctor (producer) (WHO Regional Office for Europe, 2002).

The moral costs of the consumer are mainly related to two factors.

Having insured, the patient receives medical services free of charge at the time of consumption or with small surcharges. Thus, the price signals that exist between the producer and the consumer in the health care market disappear and there is an excessive consumption of "free" medical services (that is, the patient seeks medical help when he could do without it, etc.).

The producers' moral costs arise from the fact that doctors have incentives to recommend to the patient unnecessary or even unnecessary examinations and procedures. Thus, excessive consumption of medical services is an inevitable feature of the medical insurance market.

Ways of compensation of moral costs of the patient (unjustified consumption of medical services) are as follows:

- use of co-payments at the time of medical care;
- restriction of choice for the patient;
- non-price restriction of procedures by doctors;
- waiting lists for some treatments and examinations;
- use of coinsurance;
- incomplete compensation of expenses (deductible, or incomplete compensation).

It should be noted that price regulators (co-insurance, co-payments, incomplete compensation) are widely used in the VHI system.

Ways to compensate the moral costs of health care providers (the behavior of doctors, in which they stimulate excessive demand for medical services) are as follows:

- control over the activities of health care providers;
- restriction of the list of prescribed (free) medicines with fines for violation;

- application of methods such as clinical and statistical groups, etc. at payment of the finished cases, that is payment of the finished cases under the beforehand established tariffs;
- use of fundholding schemes (when primary care physicians buy the necessary services for their patients).

In the VHI market, information about medical services is distributed asymmetrically between doctors and patients. As a rule, there is a "demand, stimulated by producers." Indeed, the role of doctors is unique in its ability to influence the demand for medical services. At the same time, doctors are often guided by their own economic interests (Hermesse and Lewalle, 1995). Therefore, in most cases, medical services for the benefit of patients are acquired by qualified intermediaries - insurers. Another form of patient protection is the licensing of physicians, certifying that their knowledge and skills correspond to established standards.

The unattainability of an ideal private health insurance market justifies the advisability of government intervention, which takes various forms in different countries. The degree of intervention differs, but it is present everywhere. The degree of government intervention is constantly changing - it increases where it is weak, and weakens, if too much. The decision depends on prehistory, traditions, national mentality and other factors (Rees, Gravelle and Warnbach, 1999).

Thus, the state can regulate the activities of insurers, establish such standards for the formation of funds for conducting business so that only relatively large insurance organizations can operate on the insurance field, that is, to exclude the uneconomical activity of many small insurers.

Despite the variety of specific forms of organization of the VHI system, a number of functions reflecting the commonality of development inherent in different countries can still be singled out.

5. MECHANISMS FOR FINANCING AND PROVIDING MEDICAL CARE IN VHI

It is known that health financing through the VHI system covers several different functions (WHO Regional Office for Europe, 2002).

The first important function of this type of financing is the mechanism for raising funds (collection of payments). Collection of private medical insurance premiums can be carried out by independent private organizations - private commercial insurance companies or private non-commercial insurance companies and funds.

The mechanism for raising funds is private insurance premiums. Private medical insurance premiums are paid either by a separate individual or by hired workers on a share with the employer or only by the employer.

The second no less important function of financing VHI is the creation of pools of funds collected from direct user charges and the distribution of these

funds in an insurance organization. One of the problems of VHI is the pooling of risks and the distribution (redistribution) of funds within the fund.

In terms of VHI, each fund unites subscribers of the same insurer. However, the possibilities of combining (concentrating, averaging) risks are limited by actuarial premiums, the size of which is determined by the risk of an individual subscriber. Calculation of risks taking into account group risks allows to combine risks for all employees of this company. At the same time, the most important political aspect of creating pools and allocating funds is the movement of funds from healthy to sick (risk sharing).

VHI, like user charges, relates the amount of an individual contribution to the fact of illness, and not to the amount of income. When financing through user charges, risks are allocated according to the fact of the illness or, at least, according to the fact of using medical care.

Premiums calculated according to individual risk are based on actuarial probabilistic calculation. This is the most common way of calculating the size of the premium in the individual VHI market. Insurance premiums can be calculated taking into account individual risks on the basis of an estimation of the probability of how much this individual may need medical assistance.

Where policies are purchased through the intermediary of the employer, bonuses are usually calculated on the basis of group risk, that is, the average risk value for employees of the firm.

Calculation of actuarial premiums involves great difficulties, as the predicted and real costs differ significantly. The intelligibility of insurers can grow in proportion to the age of the person acquiring the policy. At the same time, the pooling ability of risks falls as the age of applicants for a policy increases. This creates difficulties for VHI, which is most effective when the aggregate risks are well known, and the individual risks are not present (Gauthier, Lamphere and Barrand, 1995).

Private long-term health insurance is recommended as a means of protection in case of disability in old age. However, studies show that insurance of this type is characterized by fairly complex actuarial calculations. The so-called area of uncertainty between the lowest and highest planned values relative to future treatment needs is extremely wide.

The third function of VHI financing is the mechanisms for paying expenses (reimbursement of the cost of services).

In the VHI market, there are 2 types of *financing systems* (Isakova and Sheiman, 1993):

1. Private financing, private health care providers.
2. Private funding, non-profit providers of medical services (group general or family practice or health care organization).

For a more accurate classification, the concepts of "key figures" of the system of organizational interaction in VHI are used:

1) the population (patients);
2) manufacturers of first level medical services - general practitioners, family doctors;
3) manufacturers of medical services of the second level - medical specialists, hospitals;
4) the third party is an intermediary-insurer or other authority - the buyer of medical assistance;
5) government (as a regulator).

The scheme provides that patients pay for medical services themselves, but their cost (usually part of the cost) is reimbursed by the insurance company.

To prevent unjustified consumption of medical services by the consumer, insurers widely use:

- co-insurance when part of the insurance premium is paid by the employer, and a part by the insured person;
- "deductible", or franchise, when the patient pays the medical services himself to a certain amount, above which the insurer pays the refund.

In this scheme, insurance premiums depend on individual risks (or risks of a small group). The insured have full freedom in choosing a doctor or medical institution (within the list of services included in the insurance plan). In the scheme, the financing party (insurers) and providers of medical services are separated. The insurance company does not have any contracts with manufacturers (doctors, hospitals), paying their services on a fee-based basis.

Thus, the insurer does not have levers of influence on the manufacturer. Doctors have incentives to increase the number and cost of services provided, to increase the amount of expensive surveys. That is, in this system there is demand, stimulated by the producer. Attempts by insurers to control the volume and cost of services did not yield any noticeable results. With such a system, the shortcomings of the private health insurance market are fully manifested (Gauthier, Lamphere and Barrand, 1995).

- selection of risks;
- demand, stimulated by suppliers, leading to excessive provision of medical care.

6. SCHEME OF ORGANIZATION OF VHI WITH INTEGRATION BETWEEN INSURERS AND HEALTH SERVICE PROVIDERS

The scheme uses the integration of the financing party (insurer) and the provider of medical services. The scheme differs from the previous one in that doctors and medical institutions separated from the purchaser of medical services (insurer or funding body) work with him on contracts. Buyers enter into agreements with medical institutions that specify the volumes, quality and cost of purchased services, and can choose suppliers, including outside their own territory.

One type of contract is the private financing of group general or family practice (insurance premiums are determined depending on the risk of the occurrence of an insured event).

At the same time, private financing provides not only covering the costs of practice, but also payment for planned hospitalizations, additional examinations and consultations of other doctors. Thus, economically motivated physicians of the primary health care unit appear on the domestic market (Wagstaff, van Doorslaer and van der Burg, 1999).

At the same time, primary care physicians have become economically interested in serving more patients, providing them with maximum services on their own or in outpatient settings. Active prophylactic activity has become profitable for them, reducing the incidence, and hence the costs. At hospitalization of patients there was an interest to direct the patient to that hospital where it is possible to receive adequate qualitative treatment at reasonable rates. Thus, primary care physicians in determining the tactics of patient treatment simultaneously solve the problem of optimizing the costs of its treatment.

Group general or family practice is the organization for maintaining health (prevention and promotion of health). They are considered to be the preferred providers of health care services, focusing on the provision of managed care.

The degree of controllability varies - from the creation of integrated assistance systems in which insurers and doctors work in a single legal structure, before concluding contracts with some manufacturers. Thus, the peculiarity of the system of integration of insurers and manufacturers of medical services is the restriction of choice for the insured.

Group general or family medical practices are actively engaged in resource management to optimize their use and reduce the cost of medical care to the insured (Mason, 1939).

At the same time, both administrative and economic measures are taken:

- compulsory observation by a general practitioner;
- participation of patients in preventive programs;
- strict control of hospitalization (coordination, control over the timing);
- shifting the bulk of assistance to the outpatient stage, etc.

The outlined scheme of organization of VHI on the basis of integration of activity between insurers and manufacturers of medical services and their financing on a contract basis creates conditions for more efficient functioning of the model.

This scheme is characterized by:

- control over the adequacy of costs;
- minimizing the desire of physicians to stimulate demand for medical services;

- the existence of competition among health care providers at least the primary link (preferably if they are private entrepreneurs).

The operating costs for private health insurance are generally higher. They are associated with significant administrative costs for billing, contracting, inspection and marketing. Such efforts are necessary both for risk assessment, awarding bonuses, developing complex benefits packages and for verifying and paying insurance claims or refusing to pay for these requirements.

The fourth function of financing in VHI is the definition of forms and methods of state regulation of the provision of medical care (Hermesse and Lewalle, 1995; Rees, Gravelle and Warnbach, 1999).

VHI can be partially subsidized by the state using tax rebates or exemption from taxes. Subsidies for VHI can be made from tax revenues. Targeted grants can be vouchers (cash allocated by means of a means test) or direct acquisition of insurance by the state on behalf of the applicant (WHO Regional Office for Europe, 2002).

The main forms of tax incentives for purchasing VHI are tax exemption (premiums deducted from the total income before withholding taxes) and tax rebate (deduction from the total amount of taxes mandatory for an individual or a household). Such tax benefits are often not taken into account in national economic balances and therefore can be considered a hidden form of public expenditure. They can be politically advantageous, especially in an environment where high public spending is not welcome.

Tax benefits - the same real transfer of public funds to the private sector, as well as direct subsidies. Encouraging private health insurance, tax benefits introduce an element of progressivity into the overall structure of health care financing.

Governments can maintain private insurance on a fairly large scale, using various forms of regulation that limit the competitive strategies of private insurers. They may require insurers to take into account the social risks (that is, the establishment of similar premiums for all applicants), rather than assessing individual or group risks (that is, determining the amount of premiums depending on past experience or other factors related to risks).

Since the inclusion of public risks is in principle incompatible with maximizing profits, further regulatory measures and various forms of subsidies or transfer of funds between insurers are necessary to support it.

Governments can go even further by requiring all or some citizens to buy private insurance services on conditions dictated by the state. At the same time, when promoting private insurance, hidden forms of tax financing separate governments from health care providers.

7. CONCLUSIONS

A study of the experience of a number of European countries shows that voluntary health insurance is an additional source of health financing. It is present both in countries with budgetary financing, and in countries with social health insurance. Voluntary medical insurance is applied to the solvent part of the population or for certain high-tech, more comfortable or optional types of medical care.

The review analyzes the features of the model of voluntary medical insurance and its development trends in different countries of the European Union. Voluntary health insurance accounts for less than 10% of total health financing in these countries (with the exception of France - 12.2% and the Netherlands - 17.7%) and is intended for people with higher than average national income.

The spread of voluntary health insurance in European countries is influenced by such factors as the size of public and private sector expenditures, cultural traditions that determine the forms of payments for medical services (Кучеренко, Соколов and Мартынчик, 2008).

The market structure has been studied and three types of voluntary medical insurance have been identified: replacement insurance (serves as a substitute for the state system), complementary insurance (provides coverage for services not compensated or only partially compensated by the state) and additional insurance (serves to speed up access and expand consumer choice).

The main functions of the economic model of voluntary medical insurance and its main characteristics are analyzed.

Among the economic functions that express the main features of VHI are:

- mechanisms for mobilizing financial resources (ways of collecting payments);
- ways of creating pools (pooling) of funds and their distribution (redistribution);
- mechanisms for paying for expenses (ways of reimbursing the cost of medical services);
- forms and methods for regulating the provision of health care.

The nature of distribution and the level of development of voluntary medical insurance are largely determined by the ratio of individual and group purchases of insurance services. Group schemes (in which purchases are made on behalf of the employer and employees of the same firm) are popular insofar as they are characterized by relatively low cost and provide a high volume of transactions without special market costs.

Further development of this type of insurance and expansion of its use are actively debated in the countries of the European Union. Voluntary health insurance, on the one hand, contributes to an increase in the flow of funds to health care, the development of high medical technology and competition among

health care providers, on the other hand, it limits the access of the poor to certain types of medical care.

To encourage and support this type of health insurance, several governments in Europe are using tax incentives to purchase health services - tax breaks and targeted subsidies. These measures of state regulation allow to correct the problems caused by negative selection of patients in the market, and also to increase the availability of services for the population.

Improving the quality of insurance coverage and effective use of resources is based on the introduction of managed care programs. These programs provide, on the one hand, the introduction of health care services into the structure of health services, and on the other, the formation of a system of integrated activities between insurers and providers of health services. This, in turn, creates prerequisites for both the formation of a competitive environment and for rationing the costs of medical care in VHI terms.

References

1) Busse, R. (2000). *Health Care Systems in Transition: Germany.* Copenhagen: European Observatory on Health Care Systems.
2) Comite Europeen des Assurances, (2000). *CEA Health Insurance in Europe: 1998 Data.* CEA ECO 12, July. Paris.
3) Couffinhal, A. (1999). *Concurrence assurance sante: entre efficacite et selection, (Competition in health insurance: between efficiency and selection).* PhD. Paris University.
4) Datamonitor, (2000). *European Health Insurance 2000: What's the Prognosis, Doctor?.* London: Datamonitor.
5) Emmerson, C, Frayne, C. and Goodman, A. (2001). Should private medical insurance be subsidized?. *Health Care UK*, 51(4), pp. 49-65.
6) Eurostat, (2018). *Healthcare expenditure statistics, March 2018.* [online] Available at: http://ec.europa.eu/eurostat/statisticsexplained/index.php/Healthcare_expenditure_statistics [Accessed 03.05.2018].
7) Gauthier, A., Lamphere, J.A. and Barrand, N.L. (1995). Risk selection in the health care market: a workshop overview. *Inquiry,* 32, pp. 14-22.
8) Hermesse, J. and Lewalle, H. (1995). Regulation of prices and services covered by the complementary health schemes: status quo and future needs. In: M. Schneider, ed., *Complementary Health Schemes in the European Union*, BASYS Publications. [online] Available at: http://www.basys.de/publikationen/chs-i.php [Accessed 03.05.2018].
9) Исакова, Л.Е. and Шейман, И.М. (1993). Оплата медицинской помощи в условиях медицинского страхования. Зарубежный опыт и практические рекомендации. Реформы здравоохранения, 2, 105 p.
10) Кучеренко В.З., Соколов А.Г. and Мартынчик С.А. (2008). Основные направления модернизации рынка добровольного медицинского страхования, *Экономика здравоохранения*, 2, pp. 5–10.

11) Mason, E.S. (1939). Price and production policies of the large-scale enterprise, *American Economic Review*, 29 (suppl), pp. 61-74.
12) OECD, (2000). *OECD Health Data 2000: A Comparative Analysis of 29 Countries*. Paris: Organization for Economic Cooperation and Development.
13) Rees, K, Gravelle, H. and Warnbach, A. (1999). Regulation of insurance markets. *Geneva Papers on Risk and Insurance Theory*, 24, pp. 55-68.
14) Saltman, R.V., Busse, R. and Figueras, J. (2004). *Social health insurance systems in Western Europe*. London: Open University Press.
15) Wagstaff, A., van Doorslaer, E. and van der Burg, H. (1999). Equity in the finance of health care: some further international comparisons. *Journal of Health Economics,* 18(3), pp. 263-290.
16) WHO Regional Office for Europe, (2002). *Health financing: alternatives for Europe*. Bonne, Germany: "The Whole World" Publishing House.
17) World Health Organization, (2001). *Macroeconomics and health: investment in health for economic development. Report of the Commission on Macroeconomics and Health*. Geneva: WHO Regional Office for Europe.
18) World Health Organisation, (2002). *Mobilizing domestic resources for health*. Geneva: WHO Regional Office for Europe.
19) World Health Organization, (2004). *Voluntary health insurance in the European Union*. WHO Regional Office for Europe.

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Section IV

EU PUBLIC SPENDING AND CONTROL

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UNFAIR TERMS IN CONTRACTS CONCLUDED BY LAWYERS FROM THE PERSPECTIVE OF THE EUROPEAN UNION LAW AND THE COURT OF JUSTICE OF THE EUROPEAN UNION JURISPRUDENCE

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Abstract
The present paper aims to examine to what extent Council Directive 93/13 / EEC of 5 April 1993 on unfair terms in consumer contracts is applicable to contracts concluded by lawyers. This analysis addresses the lawyer's contractual position from two perspectives. The first aspect is to qualify the legal assistance contract as a contract that falls within the scope of regulating abusive clauses and implicitly qualifying lawyer as a "seller or supplier" within the meaning of the Directive. The second direction of the research concerns, on the one hand, the applicability of the European Union law and the national transposing law regarding the abusive clauses in the credit agreements concluded by a lawyer with a banking institution, and on the other hand, to what extent a lawyer's office, a legal person, can be considered a "consumer" from the point of view of the Directive.
The present study focuses mainly on addressing the issues raised by the jurisprudence of the Court of Justice of the European Union which, although it has not changed its optics, has qualified the lawyer both as a "seller or supplier" and as a "consumer".
The academic and practical interest of the work derives from the fact that it addresses both law theorists and lawyers from all EU Member States or even the other liberal legal professions, notary, judicial executor, etc.
Keywords: *EU Law; unfair terms; abusive clause; consumer contracts; lawyer.*
JEL Classification: K12

1. LEGAL FRAMEWORK

At the European Union level it was adopted the Directive no. 93/13/EEC of the Council of Europe on unfair terms in consumer contracts, as amended by Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council.

Council Directive 93/13 /EEC on unfair terms in contracts concluded with consumers has been transposed into Romanian law by Law no. 193 of

06.11.2000 regarding the abusive clauses in the contracts concluded between traders and consumers, republished in the Official Gazette, Part I no. 543 from 03.08.2012, consolidated on 13.06.2014.

The directive has four essential characteristics.

Firstly, it is a directive that deals with all consumer contracts in general. It does not specifically refer to a particular category of consumer contracts or to any particular field.

Secondly, it is a specific directive on the scope of consumption because it concerns only the contractual relationships between professionals on the one hand and consumers on the other. It differs, therefore, from national laws on the general conditions of contracts, which, in principle, apply in all contractual relationships. Therefore, in order to be able to rely on the provisions of the Directive, that person must have the status of consumer in the sense defined by the directive itself.

Third, the directive only refers to the abusive clauses. It contains provisions on the presentation and interpretation of consumer contract clauses: they must be drafted "in a clear and comprehensible manner" and in case of doubt as to the meaning of a clause, the "interpretation most favorable to the consumer" prevails (principle of interpretation in favor of the consumer in case of doubt).

It is a minimal directive because it leaves member states the freedom to adopt more consumer-friendly provisions in their national legislation to ensure maximum protection. A Member State may therefore maintain or introduce more stringent consumer protection measures than those of the Union as long as they are compatible with the Treaties and the Commission is notified thereof.

2. SCOPE OF APPLICATION

The notion of consumer

The notion of consumer is of particular importance in the delimitation of the scope of the Directive because it seeks to protect certain categories of contractors against abusive clauses.

We can say that the notion of consumer is susceptible to two meanings. In a narrow sense, a consumer means a natural person who concludes a contract for the purchase of goods or the provision of services for personal or family benefit. In the extended sense, there are also professionals who, through the contracts concluded, aim to satisfy personal interests.

The notion of trader / professional

Unlike the notion of consumer, the trader has not raised so many problems, both at European Union and national level, a trader means any natural or legal person acting for the purposes of his public or private professional activity.

Some differences can be found with regard to the terminology used: either the terms "seller" and "supplier", or "trader" or "professional" are used.

The notion of an abusive clause

The notion of abusive clause is defined in Art. 3 of Directive 93/13/EEC. By abusive clause is meant any contractual clause that has not been negotiated individually and in contradiction with the requirement of good faith, which causes a significant imbalance between the rights and obligations of the parties to the contract, to the detriment of the consumer.

According to the provisions of art. 4 paragraph 1 of the Law no. 193/2000 (republished and consolidated on 13.06.2014), those clauses which have not been negotiated directly with the consumer are abusive and which, in themselves or together with other provisions of the contract, creates an imbalance contrary to the good faith between the rights and obligations of the parties.

There are two conditions that a clause must meet in order to be considered abusive: not to be individually negotiated and to create a significant imbalance between the rights and obligations of the parties to the detriment of the consumer.

According to art. 3 par. 3 of Directive 93/13/EEC, Annex I contains an indicative and non-exhaustive list of terms that can be considered abusive.

In the following, we propose to present situations from the jurisprudence of the Member States regarding the assessment of the unfairness of the contractual clauses. This analysis addresses the lawyer's contractual position from two perspectives.

The first concerns the classification of the legal aid contract as a contract falling within the scope of the regulation of unfair terms and implicitly the qualification of the lawyer as a "seller or supplier" within the meaning of the Directive.

The second aspect of the investigation is, on the one hand, the applicability of European Union law and national transposing law on unfair terms in credit agreements concluded by a lawyer with a banking institution, and on the other hand to what extent a lawyer may be considered a "consumer" from the point of view of the Directive.

3. THE CASE OF BIRUTE SIBA AGAINST ARUNAS DEVENAS. C-537/13, JUDGMENT OF 15 JANUARY 2015

„Reference for a preliminary ruling - Directive 93/13 / EEC - Scope - Contracts concluded with consumers - Contract for the provision of legal services between a lawyer and a consumer)"

The reference was made in the course of proceedings between Ms. Siba and Mr. Devenas, in his capacity as a lawyer, concerning a claim for payment of legal fees.

The Court of Justice of the European Union has decided that "Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as applying to standard form contracts for legal services, such as those at issue in the main proceedings, concluded by a lawyer with a natural person acting for purposes which are outside his trade, business or profession".

In order to reach this conclusion, the CJEU considered the scope of the criteria for assessing the unfairness of a contractual clause set out in Directive 93/13, detailing the conditions in which they are applicable to service contracts, depending on their specificity.

In this context, the CJEU has made important remarks on the following issues:

- Applicability of Directive 93/13 to legal service contracts according to the contractors quality criterion. The quality of "vendor or supplier" of the lawyer within the meaning of this Directive;
- Applicability of Directive 93/13 to legal service contracts according to the criteria of the protection system;
- Standardized clauses cannot raise the issue of confidentiality of lawyers' relationships with "customers";
- The negotiated terms of law contracts containing information subject to confidentiality do not fall within the scope of Directive 93/13.

The main proceedings and the questions referred for a preliminary ruling

Ms. Šiba concluded with Mr. Devėnas, in his capacity as a lawyer, three standard-form contracts for the provision of legal services for a fee: on 25 February 2008 a contract to represent her in proceedings for divorce, division of the spouses' property and the determination of her child's place of residence, on 14 November 2008 a contract to represent her in proceedings for the annulment of a transaction by Mr. Šiba, and on 21 January 2010 a contract by which Ms. Šiba instructed Mr. Devėnas to bring on appeal before the Klaipėdos apygardos teismas (Regional Court, Klaipėda, Lithuania) and to represent her in the proceedings before that court.

The arrangements for payment of fees and the periods within which payment was to be made were not specified in those contracts; the contracts also did not identify precisely the various legal services for which payment was claimed and the cost of the relevant services.

Since Ms. Šiba did not pay the fees within the period stipulated by Mr Devėnas, the latter brought an action before the Klaipėdos miesto apylinkės teismas (District Court, Klaipėda, Lithuania) seeking an order that she pay 15 000 Lithuanian Litas (LTL) for fees due.

However, the Supreme Court of Lithuania had doubts about the incidence of Directive 93/13 / EEC on unfair terms in consumer contracts on law contracts and decided to suspend the case and address the CJEU.

Thus, the following preliminary questions were formulated:

1. Is a natural person who receives legal services pursuant to agreements for legal services concluded with a lawyer (an advokatas) for a fee, those services being supplied in cases which are likely to be connected with the natural person's personal interests (divorce, division of assets acquired in the marriage and so forth), to be regarded as a consumer within the meaning of EU consumer protection laws?

2. Is a lawyer (an advokatas who is a member of a "[liberal] profession") who draws up an agreement with a natural person for the supply of legal services in return for a fee, which obliges him to provide legal services so that the natural person may achieve aims unconnected with her occupation or profession, to be regarded as a "[seller or supplier]" for the purposes of EU consumer protection laws?

3. Do agreements for the supply of legal services for a fee which a lawyer (an advokatas) draws up in the course of his professional activities as a representative of a liberal profession fall within the scope of Council Directive 93/13?

4. If the third question should be answered in the affirmative, are general criteria to be applied in classifying such agreements as consumer contracts or should they be recognised as consumer contracts according to special criteria? If it is necessary to apply special criteria for the classification of such agreements as consumer contracts, what are those criteria?'

The Court concluded that "a lawyer who, as in the case in the main proceedings, provides a legal service for a fee, in the course of his professional activities, to a natural person acting for private purposes is a 'seller or supplier' within the meaning of Article 2(c) of Directive 93/13. The contract relating to the supply of such a service is, therefore, covered by that directive".

In this respect, the CJEU cites Cipolla and Others, C 94/04 and C 202/04, paragraph 68, according to which, in the field of lawyers' services, there is, in principle, an inequality between 'customers' and lawyers, because of the differences between the parties in the field of information. As indeed lawyers have a high level of technical skills that consumers do not necessarily have, so that the latter may have difficulties in assessing the quality of the services they are provided with.

4. CASE HORATIU OVIDIU COSTEA V SC VOLKSBANK ROMANIA SA. C-110/14, JUDGMENT OF 3 SEPTEMBER 2015

„Reference for a preliminary ruling — Directive 93/13/EEC — Article 2(b) — Concept of 'consumer' — Credit agreement concluded by a natural person who practices as a lawyer — Repayment of a loan secured on a building owned by the borrower's law firm — Borrower who has the necessary knowledge to assess the unfairness of a term before signing the agreement".

The present request for a preliminary ruling from the Judecătoria Oradea (Romania) provides the Court with the opportunity to rule on the definition of consumer within the meaning of Article 2(b) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts ('the Directive'), pursuant to which a 'consumer' is any natural person who, in contracts covered by the Directive, is acting for purposes which are outside his trade, business or profession.

Although judicial interpretations of the term 'consumer' have been provided in a number of areas of EU law, the concept has so far not been developed exhaustively in the case-law relating to the specific area of the Directive, the interpretation of which is sought in the present case.

In particular, the unusual feature of this case is that it questions whether a legal professional may be regarded as a consumer when he concludes a credit agreement secured on immovable property owned by his law firm. The question thus arises, on the one hand, of the effect of the particular skills and knowledge of a person on his status as a consumer and, on the other hand, of the effect of that person's role in an ancillary security agreement on his status as a consumer in a principal credit agreement.

Main proceedings and question referred for a preliminary ruling

The present reference for a preliminary ruling arises in the context of civil proceedings between Mr. Costea, the applicant, and SC Volksbank România SA ('Volksbank'), the defendant, in which a declaratory judgment is sought from the Judecătoria Oradea (Romania), a civil court of first instance.

The applicant, Mr. Costea, is a lawyer practising in the field of commercial law. In 2008, Mr. Costea entered into a credit agreement with Volksbank ('the disputed agreement'). According to the order for reference, that agreement was also signed by the law firm 'Costea Ovidiu' in its capacity as mortgage guarantor. On the same date as the credit agreement, an agreement was also concluded pursuant to which the law firm 'Costea Ovidiu', as the owner of the building, agreed with Volksbank the security for repayment of the loan referred to above ('the security agreement'). The law firm 'Costea Ovidiu' was represented for those purposes by Mr. Costea. It is that fact which drew the attention of the defendant bank to the borrower's profession.

On 24 May 2013, Mr. Costea lodged the application in the main proceedings against Volksbank, seeking a declaration that the term relating to the 'risk charge', set out in paragraph 5(a) of the credit agreement, is unfair, and also seeking reimbursement of the amounts received by the bank in respect of that charge.

Mr. Costea bases his claims on his status as a consumer, relying on the provisions of Law No 193/2000 which transposes the Directive into Romanian law. In particular, Mr. Costea submits that the 'risk charge' term was not

negotiated and was instead imposed unilaterally by the bank. The applicant concludes from this that the term is unfair and further submits that the mortgage guarantee attached to the loan eliminated that risk. The order for reference does not discuss the subject-matter of the term or its possible unfairness.

The Judecătoria Oradea took the view that an interpretation of Article 2(b) of the Directive is necessary in order to dispose of the main proceedings and it therefore referred the following question to the Court for a preliminary ruling:

"Must Article 2(b) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts be interpreted as including in, or as excluding from, the definition of "consumer" a natural person who practises as a lawyer and concludes a credit agreement with a bank, in which the purpose of the credit concerned is not specified, when in that agreement that natural person's law firm is stated to be the guarantor for the mortgage?"

The notion of consumer related to the profession of lawyer

The uncertainty surrounding Mr. Costea's status as a consumer, which is the reason for the question referred for a preliminary ruling, stems from the fact that Mr. Costea is a lawyer by profession.

Volksbank states that, in order to be able to regard a person as a consumer, in addition to finding that an objective criterion is satisfied — resulting from the wording of Article 2(b) of the Directive — a subjective criterion must also be satisfied, relating to the spirit of the Directive, which is to protect the consumer as the weaker party who is generally not aware of the statutory provisions. Thus, according to Volksbank, the presumption that a consumer is in a position of inequality may be rebutted if that consumer is found to have the experience and information necessary to protect himself on his own.

The Court's considerations

In Siba (cited above), the Court held that "lawyers have a high level of technical skills that consumers do not necessarily have".

However, those considerations referred to a situation in which the lawyer in question 'provides a legal service for a fee, in the course of his professional activities, to a natural person acting for private purposes' and is, therefore, a seller or supplier within the meaning of Article 2(c) of the Directive.

Further, an interpretation of the kind proposed by Volksbank would result in all persons who had legal advice or professional advice of another kind when the contract was concluded being denied the status of consumer.

The concept of consumer, within the meaning of Article 2(b) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, must be interpreted as including a natural person who practices as a lawyer and concludes a credit agreement with a bank, where a building owned by his law firm is also covered by that agreement as mortgage security, when, in the light of

the evidence available to the national court, it emerges that that person acted for purposes outside his trade, business or profession.

As regards the services provided by lawyers in the context of service contracts, the Court has already taken into account the inequality between 'consumer-customers' and lawyers, in particular because of the differences between the contracting parties in the field of information (Siba, C-537/13, EU: C: 2015: 14, paragraphs 23 and 24).

That consideration cannot, however, exclude the possibility of qualifying a lawyer as a 'consumer within the meaning of Article 2 (b) of the Directive when that lawyer acts for purposes outside his professional activity.

The judgment of September 3, 2015

The concept of consumer, within the meaning of Article 2(b) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, must be interpreted as including a natural person who practices as a lawyer and concludes a credit agreement with a bank, where a building owned by his own law firm is also covered by that agreement as mortgage security, when, in the light of the evidence available to the national court, it emerges that that person acted for purposes outside his trade, business or profession.

If the national court takes the view that it is not clear that a contract was concluded exclusively with either a private purpose or a trade or professional purpose, the contracting party in question must be regarded as a consumer if the trade or professional purpose is not predominant in the overall context of the contract, having regard to the totality of the circumstances and an assessment of the objective evidence available to the national court, which it is for that court to evaluate.

The role of a natural person, in his capacity as the legal representative of his own law firm, in the conclusion of an ancillary security agreement does not affect his status as a consumer in relation to a principal credit agreement.

5. CONCLUSIONS

There is, in principle, an inequality between "consumer - customers" and lawyers, in particular because of differences in information. Advocates have a high level of technical skills that consumers do not necessarily have so that the latter may have difficulty in assessing the quality of the services provided to them.

The specific wording of a contractual clause, in particular as regards the arrangements for determining the lawyer's fees, may at least incidentally divulge certain aspects of the relationship between lawyer and client who should remain secret. However, such a clause would be individually negotiated and, for that reason, would be exempted from the application of Directive 93/13.

The assessment of the unfair nature of the clauses in the light of the criteria of the nature of the contract and its intelligibility and clarity is made by the referring courts.

Obviously, in the preliminary ruling procedure, the CJEU cannot judge the abusive or abusive nature of the clauses in the main dispute, but merely interpret the provisions of the Directive so that the national courts can then apply those interpretations in concrete cases.

However, Directive 93/13 contains two general criteria for assessing the unfairness of the clauses, which can only be analyzed in the specific circumstances of the case. The criterion of the nature of the services covered by the contract (referred to in Article 4 (1) of Directive 93/13) and the criterion of clear and comprehensible language in written contracts (referred to in Article 5 of Directive 93/13).

References

1) *Birute Siba v. Arunas Devenas* [2015] C-537/13, Court of Justice of the European Union, 1.
2) *Cipolla and others* [2006] C 94/04 and C 202/04, Court of Justice of the European Union, 1.
3) Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises, OJ L 372, 31.12.1985, pp. 31–33.
4) Directive no. 93/13/EEC of the Council of Europe on unfair terms in consumer contracts, OJ L 95, 21.4.1993, pp. 29–34.
5) Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts - Statement by the Council and the Parliament re Article 6 (1) - Statement by the Commission re Article 3 (1), first indent, OJ L 144, 4.6.1997, pp. 19–27.
6) Directive 1999/44/EC of the European Parliament and of the Council on certain aspects of the sale of consumer goods and associated guarantees, OJ L 171, 7.7.1999, pp. 12–16.
7) Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, OJ L 304, 22.11.2011, pp. 64–88.
8) *Horatiu Ovidiu Costea V. SC Volksbank Romania SA* [2015] C-110/14, Court of Justice of the European Union, 1.
9) Law no. 193 of 06.11.2000 regarding the abusive clauses in the contracts concluded between traders and consumers, republished in the Official Gazette, Part I no. 543 from 03.08.2012, consolidated on 13.06.2014.

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STUDY ON THE AUDIT OF PROJECTS FROM EUROPEAN FUNDS IN 2007-2013 AND IMPACT ON PRESENT AND FUTURE OF GRANTS

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Abstract
Starting with January 2014, it was considered that only financial auditors can participate in auditing European projects, in accordance with the Protocol concluded between the Ministry of European Funds and the Chamber of Financial Auditors in Romania. Even if a financial auditor's financial statements were audited by a financial auditor, however, the audit report drawn up in connection with them does not replace the auditor's report on a project financed by European funds that the entity benefited from and which be drawn up in accordance with a particular reference. Of course, all of these aspects looked at the projects to be funded from the 2014-2020 Programs. But, in the context of the current regulations on the implementation of the 2014-2020 operational programs, the independent financial audit of European funded projects is no longer a mandatory activity. As a result, the Collaboration Protocol has become obsolete and has therefore been terminated (in May 2017) by a number of specialists disputed. Given the conditions, the audit of the projects remains under the responsibility of the Audit Authority within the Court of Accounts of Romania.
This study aims at identifying the most frequent irregularities with financial impact of the beneficiaries of European projects found during the 2007-2013 period, given that the last report of the Court of Accounts on these aspects signals that the Audit Authority has detected irregularities in fish €50 million in expenditure declared for settlement by the European Commission in 2013 by Romanian entities benefiting from a Grant from Structural and Cohesion Funds. Starting from the results of the study, it is intended to identify the most risky systems that are considered the most risky, encountered at the

level of the beneficiaries of funds by the Audit Authority in the period 2007-2013, precisely in order to draw an alarm signal in this regard for the audit of the projects launched from 2014 onwards. In addition, it is also envisaged to support the reintroduction of the obligation for independent audit of projects funded by European funds.
Keywords: *Financial Audit; Structural Funds; Cohesion Funds; Chamber of Financial Auditors in Romania; Court of Accounts; Audit Authority.*
JEL Classification: K22, M42, M48

1. INTRODUCTION

For the 2007-2013 programming period, under the "Convergence" objective, Romania benefited from European Commission grant of over 19 billion Euros allocated through the Structural Funds and the Cohesion Fund, the percentage of grant funds being over 93% (Court of Accounts of Romania, 2014). This allocation was divided into seven Operational Programs, namely: the Regional Operational Program (ROP), financed by the European Regional Development Fund (ERDF); Sectoral Operational Program Increase of Economic Competitiveness (SOP IEC), financed by the ERDF; the Operational Program Technical Assistance (OPTA), financed by the ERDF; The Sectoral Operational Program Environment (SOP E), financed by the ERDF and the Cohesion Fund (CF); Sectoral Operational Program Transport (SOP T), financed by ERDF and CF; The Sectoral Operational Program Human Resources Development (SOP HRD), financed by the European Social Fund (ESF); Operational Program Administrative Capacity Development (OP ACD), funded by the ESF.

Even though the programming period was 2007-2013, according to European norms, the deadline for the eligibility of the expenditures related to the projects funded by FS and FC during this period was 31.12.2015, which means that, from the point of view of the audit, we had to deal with a mixture of old and new applicable national requirements.

It is well known that the obligation to audit European funded projects was felt to have occurred after 1995, at the request of the European Union. This obligation was included in the financing contract, which also stated how many auditor interventions were required, in terms of the number of interim audit missions and the final audit mission (Kameniczki, 2009).

Auditors of projects funded by European funds were either independent financial auditor, internal or external auditors in the public domain who intervened at various stages of project implementation. The undertaking auditor was provided in the grant agreement of a project and was designed to verify compliance information to substantiate claims for reimbursement. The procedures applied for auditing European projects until 2014 were procedures that were of the nature of an audit but on which the auditor, the beneficiary of the grant, and other entitled parties convened (IAASB, 2013), the mission to conduct the agreed procedures as guidance ISRS 4400 "Engagements to Perform Agreed-Upon Procedures Regarding Financial Information". According to this

standard, the auditor provides no assurance, but only reports on actual findings, so that report users (project financiers, in particular) form their own conclusions based on the findings reported by the auditor (IAASB, 2013).

In order to clarify references to referential references that have been reported in the past and are currently reporting to auditors of projects funded by non-reimbursable funds, we try to review the legal framework for project auditing, as well as a series of studies and research that have taken place on the edge of this topic lately.

2. LITERATURE REVIEW

At the occurrence of mandatory auditing of projects funded by non-reimbursable funds, a list of standards was not established, according to which the auditor carried out the mission. On a so-called legal framework, we can only talk about the Phare, Ispa and Sapard contractual procedures in 2006, with the advent of the Practical Guide (February 2006) (Chamber of Financial Auditors in Romania - CFAR, 2009). According to this Guide, for auditing projects, the most important standards to be taken into account were: ISA 500 "Audit Samples", ISA 530 "Auditing Sampling", ISRS 4400, and the Ethics Code of Professional Accountants.

ISRS 4400 "Engagements to Perform Agreed-On Procedures Regarding Financial Information" is the standard that sets out the general principles of a mission based on agreed procedures and which constituted until 2014 the reference on which the audits of projects funded by non-reimbursable funds were carried out. The guidance provided by ISRS 4400 targets missions that concern financial information, but also missions that address non-financial information. However, in order to perform a mission based on agreed procedures, an auditor could also take into account guidance from other ISAs. As regards financing projects as part of the activities of an entity, their auditing requires the professional accountant to apply certain procedures only to individual elements of the financial data and not to the annual financial statements of the beneficiary of grant funds taken as a whole (IAASB, 2013).

As mentioned in the introduction, auditing European projects according to the agreed procedures does not imply the expression of an insurance, but only provides a report on the actual findings, on the basis of which the sponsor formulates its own conclusions. It is important to note that although ISRS 4400 mentions that the independence of the auditor is not a requirement for engagements based on agreed procedures, national requirements may impose this on the auditor.

In our country, we believe that this requirement has become compulsory once the Protocol of cooperation between MEF and CFAR dated January 21, 2014 on the organization and functioning of financial audit for European funds and other grants from other donors (Chamber of Financial Auditors in Romania – CFAR, 2014a), but unfortunately did not resist too much, being terminated in

May 2017. Even CFAR is developed various materials (as ISA 805 and ISRS 3000) which were communicated to MFE and the Managing Authority to be approved by mutual agreement. These materials were to be used with audits of projects launched in 2014-2020 (Chamber of Financial Auditors in Romania - CFAR, 2014b). For the auditing of projects funded by European funds during the period 2007-2013, the CFAR members respected (for the final audit missions) the provisions contained in the concluded financing contracts.

Regarding the Cooperation Protocol between MEF and CFAR, since the introduction of the Protocol, it is found that the auditors had to take responsibility for the financial report independently on the independent opinion on expenditure and financing for the projects audited in compliance with ISAs fully adopted by CFAR (Chamber of Financial Auditors in Romania – CFAR, 2014a). In other words, a particular emphasis was placed on the independence of the auditor, the reference to the auditor of the previous projects and, in addition, reference was made to the independent opinion included in the auditor's report. According to ISRS 4400, it was just a report of the actual findings, on the basis of which the stakeholders set their own conclusions.

Starting from the above, the Protocol also contains a very important aspect, namely that the Managing Authority has the right to verify at all times the work of the auditors, and when deficiencies are found in the performed activity, the CFAR will sanction properly auditors. So, in the light of the new national requirements, the auditor's responsibility for European projects was much higher. This was reinforced by the auditors that the European project had to be active members of CFAR, category A certified after mandatory verification test literacy structural instruments and other grants. Also an important change included in the Protocol between MEF and CFAR was also related to the referential main which must relate auditor projects financed from grants in that mission auditor was not one based on agreed upon procedures, but a mission special purpose insurance for the eligibility of expenditure and funding sources, according to ISA 805 "Special Considerations-Audits of Single Financial Statements and Specific Elements, Accounts or Items of a Financial Statement".

But, as is known, in the context of the current regulations on the implementation of the 2014-2020 operational programs, the independent financial audit of projects funded by European funds is no longer a compulsory activity, as is clear from the Specific Guidelines. As a result, the Collaboration Protocol concluded in 2014 has become obsolete and has therefore been terminated (in May 2017) by a number of specialists disputed (Ministry of Regional Development, Public Administration and European Funds, 2017). Therefore, the auditing of projects remains under the responsibility of the Audit Authority of the Romanian Court of Accounts.

In terms of studies and research in connection with the audit of EU funded projects, reflections on the legal framework under which to organize the audit of

projects financed by the funds found in many works, even covering the period 2014-2020 (Staicu, 2014; Şerban, 2014; Şuteu, 2013; Şuteu, 2015). Other authors (Haţegan, 2013) focus on conducting studies on the involvement of active financial auditors in the area of related services to check the expenditures of European projects, namely the market concentration of these services in Romania, compared to the other auditor activities. There are authors (Botez, 2012a; Botez 2012b) who proposed Guidelines for documenting a mission to verify the amounts spent on projects financed by the Structural Funds, as can be noted in the magazine article "Auditing Practices". From the researches carried out we can conclude that the "Structural Funds Audit" paper can be set up in such a Guide (Mataragiu *et al.,* 2013). In the literature we find for synthesizing difficulties and concerns identified in the audit practice of EU funded projects (Şerban, 2012; Burja and Jeler, 2018).

Starting from the analysis of the specialized literature and from the requirements that were included in the Protocol between the MEF and CFAR on the audit of projects financed by non-reimbursable funds, we have focused on the analysis of the section of the Court of Auditors' Public Reports on project auditing financed by European funds over the period 2007-2013 to precisely report the most frequent irregularities found in the eligibility of project expenditure during this period and to warn financial auditors for the 2014-2020 funding period. I have directed the research in this direction, given that according to the requirements of the Protocol concluded between MFE and CFAR, the auditor's liability was much higher, CFAR having the right, as mentioned before, to properly sanction auditors when the Authority Management found deficiencies in the performed activity.

3. RESEARCH METHODOLOGY: POPULATION, SAMPLE, VARIABLES, DATA SOURCE, DATA ANALYSIS METHODS

To identify the most common and important irregularities from the audit of European projects launched and implemented in 2007-2013, the total population programs funded by grants, we stopped the projects included in the seven Operational Programs (OP) funded Structural Funds (SF) and Cohesion Fund (CF). In the period under review, the financial instruments through which the EU acted to eliminate economic and social disparities between regions for the purpose of achieving economic and social cohesion were the Structural Funds (SF) and the Cohesion Fund (CF). The Structural Funds included the European Regional Development Fund (ERDF) and the European Social Fund (ESF). Operational programs financed only from the ERDF are: SOP IEC, ROP and SOP T; ESF-financed are: SOP HRD and OP ACD, and those financed both from ERDF and CF is: SOP T and SOP E.

The analyzed sample consists of: over 7000 projects implemented in the 2007-2013 period, included in the seven Operational Programs 2007-2013,

representing about 30% of the total population (Court of Accounts of Romania, 2010, 2011, 2012a, 2012b, 2013, 2014). But, it should be noted that the present study focused on the seven Operational Programs, taken as a whole, and not on individual projects.

The variables analyzed, after collecting the primary data, are presented in the Table 1.

Table 1. Variables

Symbol	Explanation
DE	The Declared Expenses EC (thousand)
AE	Audited Expenses (thousand)
AE/DE	Share of Audited Expenses in Declared Expenses (%)
FIIAE	Total Financial Impact of Irregularities in the Audited Expenses (thousand)
IF/TI	The share of Irregularities Found in Total Irregularities on PO and years (%)
IPP/TI	Share of Irregularities in Public Procurement in Total Irregularities (%)
IOIE/TI	The share of Irregularities in Other Ineligible Expenses in Total Irregularities (%)
IF/AE	The share of Irregularities Found in Audited Expenses (%)
IF/DE	The share of Irregularities Found in Declared Expenses (%)

Source: own projection

Although we proposed that the variables presented in the table above be analyzed over a seven-year period, I finally turned to their analysis for a period of four years (2010, 2011, 2012, 2013). After analyzing the documents from which we collected the data, the 2007 period was coupled with the 2008 period, which made the comparison irrelevant and for the 2009 period, the information was presented only descriptively.

The data collection was based on bibliographic documentation using the Court of Auditors' Reports published for each of the seven years of the 2007-2013 periods. It is important to note that in the study we have collected the data that were the results of the Audit Authority, following the audit of each Operational Program for the period 2007-2013. According to Council Regulation (EC) no. 1083/2006, the Audit Authority should ensure that audits are carried out to ensure that the operational programs' management and control systems work effectively (system audit) and audits of operations on the basis of an appropriate sample, in order to obtain assurance that all declared costs are fair and legal. Based on the results of these audits, the annual control report and opinion to be submitted to the European Commission will be drafted by December 31 of each year.

In our study, six Reports of the Court of Auditors published in 2008-2013 were analyzed (2007 is coupled with 2008), following the results of the audit of the operations, not of the system audit.

For data analysis, we used quantitative methods, namely: systematization (grouping, tabulation, and graph) and comparison, using primary, derived and relative indicators, as can be seen from the presentation of the variables in Table 1. Below we present the final results and their interpretation using systematization using graphical tools.

4. RESULTS AND DISCUSSIONS

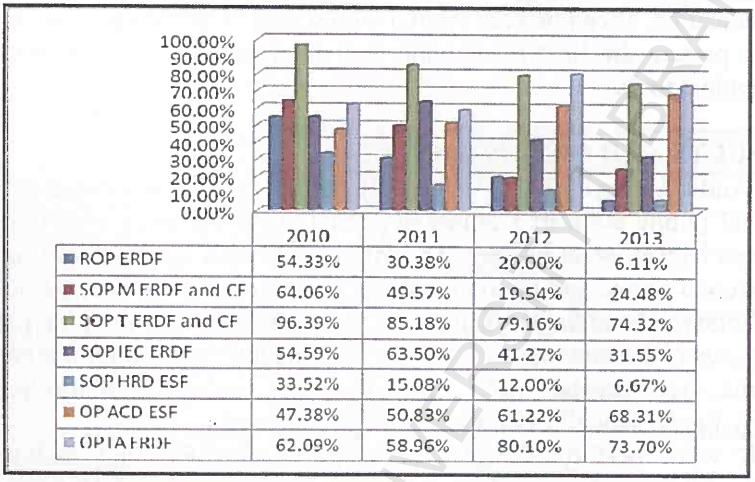
The Audit Authority (AA) is the only national authority competent to carry out external public audit of Community grants in accordance with Community and national legislation at present. The mission of the Audit Authority is to carry out the external public audit and to express an opinion on the management of the non-reimbursable financial assistance granted to Romania by the aforementioned programs. AA is the one that informs the European Commission, the Parliament of Romania, but also the public opinion on the use of the non-reimbursable community funds, as well as on the main deficiencies.

Audit work performed by AA complies with EU and national legal framework, international auditing standards and professional ethics code and other internal working procedures. In the case of audit engagements, the audit procedures applied by the AA provide for an individual examination of the reimbursement requests in order to determine whether the declared and paid expenditure reflected by them has been made for the approved purposes in accordance with applicable legislation, rules and regulations. From the point of view of the audit, this means the examination of expenditure over its entire life cycle, from the beneficiary's financing request to the body responsible for payment, verifying the legality, reality and regularity of each expenditure under the program and declared to the European Commission. Where a non-compliance with a contractual, normative or procedural requirement is detected or an incorrect calculation is detected, the expense is considered to be distorted. The auditor's opinion is formed after all audit activities and after evaluating the generality of the error by comparing it with the materiality threshold established in the audit planning. In all Court of Auditors' Reports we find an acceptable level of materiality of 2% of the amount of expenditure declared. Beyond this threshold, the error rate is considered to be significant.

The results obtained from their processing are synthesized in the graphs below. Thus, starting from the variables included in Table 1, we analyze, initially, the share of Audited Expenses by AA in the total EC Declared Expenses. For the period 2010-2013, for the total Operational Programs, the percentage of audited expenditures exceeds 33%, the largest share being in 2010,

over 55%, and the lowest in 2012, by 28%. We present in Figure 1 the share of Audited Expenses in Declared Expenses.

Figure 1. Share of Audited expenses in declared expenses



	2010	2011	2012	2013
ROP ERDF	54.33%	30.38%	20.00%	6.11%
SOP M ERDF and CF	64.06%	49.57%	19.54%	24.48%
SOP T ERDF and CF	96.39%	85.18%	79.16%	74.32%
SOP IEC ERDF	54.59%	63.50%	41.27%	31.55%
SOP HRD ESF	33.52%	15.08%	12.00%	6.67%
OP ACD ESF	47.38%	50.83%	61.22%	68.31%
OPTA ERDF	62.09%	58.96%	80.10%	73.70%

Source: own projection

On Operational Programs and years, it can be seen from the previous graph that the largest share of the audited expenses in the total declared expenses in the projects is owned by SOP Transport, followed by OPTA. The explanation is that the projects included in these Operational Programs have very high values and, implicitly, generate higher weights relative to the total.

Regarding the irregularities found during the analyzed period of the audit of the projects included in the sample, it is found that at the level of the EC declared expenses of over 34 billion lei, over 11 billion are audited expenses, and the total financial corrections proposed by the audit are of approximately 290 million lei, of which over 105 million lei for 2013.

When we talk about the irregularities found as a result of the auditing of the projects financed by the Structural Funds and the Cohesion Fund during the analyzed period, we first of all take into account the irregularities found in the eligibility of the expenditures related to the public procurement and then the irregularities related to other ineligible expenses. The share of Irregularities Found in Total Irregularities can be analyzed from Figure 2.

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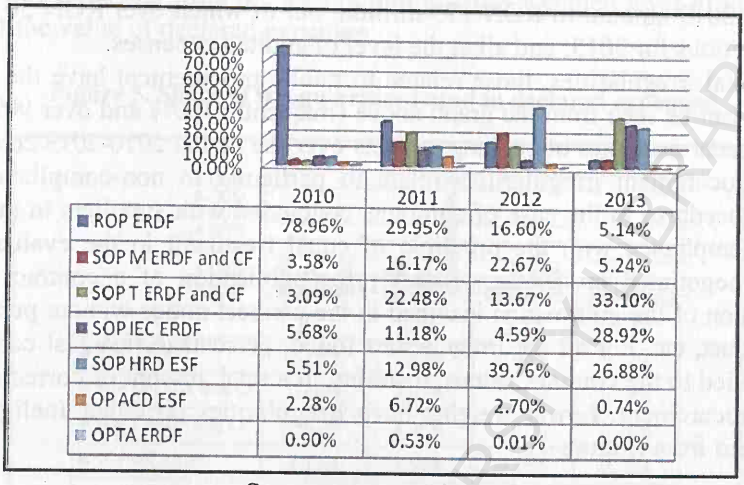
Figure 2. Share of irregularities found in total irregularities



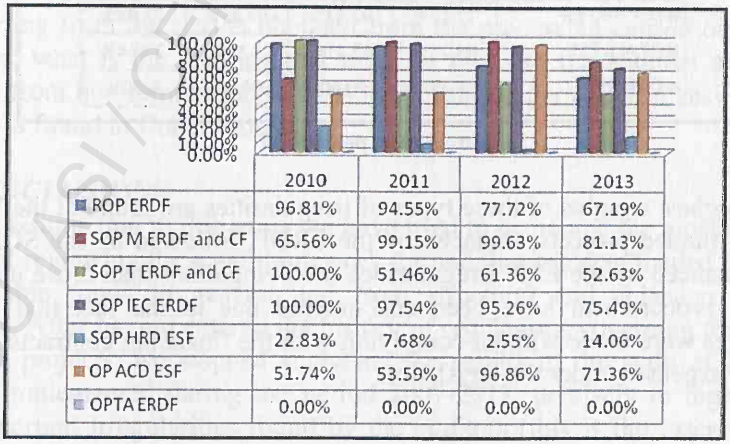
	2010	2011	2012	2013
ROP ERDF	78.96%	29.95%	16.60%	5.14%
SOP M ERDF and CF	3.58%	16.17%	22.67%	5.24%
SOP T ERDF and CF	3.09%	22.48%	13.67%	33.10%
SOP IEC ERDF	5.68%	11.18%	4.59%	28.92%
SOP HRD ESF	5.51%	12.98%	39.76%	26.88%
OP ACD ESF	2.28%	6.72%	2.70%	0.74%
OPTA ERDF	0.90%	0.53%	0.01%	0.00%

Source: own projection

As a result of the audit of the projects included in the seven Operational Programs, the total financial impact of the irregularities in the audited expenses is higher for ERDF financed ERDF projects (approximately 79% in 2010) for SOP T projects, financed by ERDF and FC (over 33% in 2013) and ESF-funded SOP HRD projects (approximately 39% in 2012).

The financial impact of irregularities on ineligible expenses by category of irregularities (Public Procurement and Other Categories of Irregularities) can be noticed if analysis of (Figures 3 and 4).

Figure 3. Share of irregularities in public procurement in total irregularities



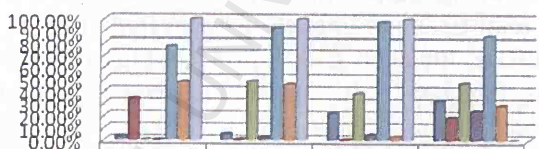
	2010	2011	2012	2013
ROP ERDF	96.81%	94.55%	77.72%	67.19%
SOP M ERDF and CF	65.56%	99.15%	99.63%	81.13%
SOP T ERDF and CF	100.00%	51.46%	61.36%	52.63%
SOP IEC ERDF	100.00%	97.54%	95.26%	75.49%
SOP HRD ESF	22.83%	7.68%	2.55%	14.06%
OP ACD ESF	51.74%	53.59%	96.86%	71.36%
OPTA ERDF	0.00%	0.00%	0.00%	0.00%

Source: own projection

The financial corrections for the eligibility of public procurement expenditure for 2010-2013 amount to RON 173 million, out of which over RON 50 million are corrections for 2013; and all at the level of audited expenses.

In total irregularities, those related to public procurement have the highest share, as can be seen from the graph above (frequently 100% and over 90%). The most frequent examples of auditing projects over the period 2010-2013 concerning public procurement irregularities relate in particular to non-compliance with award procedures in the case of contracts concluded with suppliers in the sense of non-compliance with the principle of equal treatment in the evaluation of tenders, negotiated procedure without prior publication of a contract notice, modification of the information included in the contract notice without publication of a contract, etc. For all the irregularities found, percentage financial corrections were applied to the contract values, resulting in a total amount of corrections for public procurement. Lower weights have Irregularities on Other Ineligible, as can be seen from (Figure 4).

Figure 4. Share of irregularities in other ineligible expenses in total irregularities



	2010	2011	2012	2013
ROP ERDF	3.19%	5.45%	22.28%	32.81%
SOP M ERDF and CF	34.44%	0.85%	0.37%	18.87%
SOP T ERDF and CF	0.00%	48.54%	38.64%	47.37%
SOP IEC ERDF	0.00%	2.46%	4.74%	24.51%
SOP HRD ESF	77.17%	92.32%	97.45%	85.94%
OP ACD ESF	48.26%	46.41%	3.14%	28.64%
OPTA ERDF	100.00%	100.00%	100.00%	0.00%

Source: own projection

The highest weights of these types of irregularities are found at the level of the OPTA-funded projects, financed by the ERDF, followed by the SOP HRD projects financed by the ESF. Irregularities involving other than those ineligible for public procurement have been encountered due to the fact that various expenditures were made without complying with the financing contracts and list of eligible expenses under the legislation.

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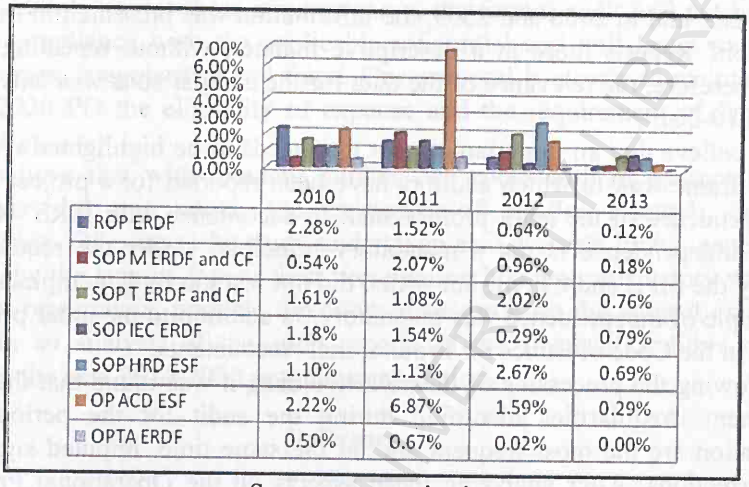
In the last graph, we analyze the weight of irregularities found in declared expenditures, starting from the assumption that the accepted level of materiality is 2% of the value of declared expenses.

Figure 5. Share of irregularities found in declared expenses



	2010	2011	2012	2013
ROP ERDF	2.28%	1.52%	0.64%	0.12%
SOP M ERDF and CF	0.54%	2.07%	0.96%	0.18%
SOP T ERDF and CF	1.61%	1.08%	2.02%	0.76%
SOP IEC ERDF	1.18%	1.54%	0.29%	0.79%
SOP HRD ESF	1.10%	1.13%	2.67%	0.69%
OP ACD ESF	2.22%	6.87%	1.59%	0.29%
OPTA ERDF	0.50%	0.67%	0.02%	0.00%

Source: own projection

From the analysis of the data attached to Figure 5, it is noted that the percentage of 2% is exceeded in the case of the related projects: ROP, SOP M, SOP T, SOP HRD and SOP ACD. Only in the case of projects financed through SOP IEC and OPTA we do not find a surplus of the significance threshold set in the planning stage of the audit mission. The assessment we find in the Court of Auditors' Public Accounts in this regard is: "the system works, but improvements are needed" (Court of Accounts of Romania, 2013).

Starting from the results obtained from the processing carried out, we ask ourselves: what is the warning that must be given to the auditors of projects financed from non-reimbursable funds in the current period? The answer to this question is found in Conclusions.

5. CONCLUSIONS

We assume that in this study we have tried to overcome the most important aspects of reviewing the legal framework for auditing projects funded from non-reimbursable funds in general and from structural and cohesion funds in particular. After having entered the history of regulations governing the audit of European projects, we stopped analyzing the results of the audit of European projects implemented during the period 2007-2013, precisely to highlight the most important irregularities found by the auditors (this is the external public

audit carried out by the Authority Audit) and to alert auditors to the projects launched and implemented during 2014-2020.

We justified in the paper that the intention was to collect project audit data for the entire 2007-2013 period, but in the end we only collected the data for the 2010-13 period, because 2007 was the launch year when expenditure was not yet declared EC, and in 2008 and 2009, the information was presented in the Court of Auditors' Reports more in a descriptive manner, without repeating all the errors. Therefore, the relevance of the data for the comparisons was only for the period 2010-2013.

We believe that an important aspect that needs to be highlighted regarding the legal framework to which auditors have been reported for a project audit is the independence of the audit professional. In accordance with ISRS 4400, the auditor's independence is not a mandatory principle. Under the requirements agreed by the MFE and CFAR, but which did not last too long, compliance with the principle of independence was mandatory, in addition to the other principles included in the Code of Ethics for Professional Accountants.

Following the processing of the collected data, it was found that the public procurement irregularities identified during the audit for the period under consideration are the most frequent and, at the same time, imputed significant value corrections. After analyzing these aspects on the Operational Programs and the years, there was a greater share of the irregularities found on Operational Programs during the last two years of the analyzed period (2012, 2013). If we take into account the seven Operational Programs 2007-2013, there is a higher share of the irregularities in the ROP, SOP T, SOP CCE and SOP HRD. The materiality threshold of 2% of the EC declared expenses, established at the planning stage of the audit mission, is exceeded in the case of ROP, SOP M, SOP T, SOP HRD, and OP ACD.

Based on these findings, future project auditors need to focus their attention on the significant procurement system when conducting an audit of a project funded by non-reimbursable funds. he recommendations and suggestions that future auditors might make to beneficiaries are: compliance with Community and national legislation on public procurement procedures; using procedures for implementing clear, written and transparent projects; ensuring a rigorous financial control of each project; making realistic financial reports on the progress of each project, etc.

However, a shortcoming is currently occurring as we turn from where we started. What this means? Independent financial auditing is not mandatory, given the specifications in the Specific Guidelines for the 2014-2020 Programs; this activity may be omitted by the beneficiaries. Theoretically, audit engagement costs are eligible, but are usually included in indirect costs and capped at a certain percentage. There are also situations where such expenses are not really eligible. What can be the consequences? First, we are dealing with the absence

of checks during project implementation, not to be able to make the necessary corrections. Secondly, these projects will only be subject to a subsequent verification by AA within the CCR. If there are situations where the audit activity is mandatory but the costs are not eligible (see OP Competitiveness), the project beneficiary will surely seek the cheapest or even the most formal solution Certainly, under these circumstances, the formal audit will not be able to ensure compliance with the applicable referential and will leave room for potential errors, irregularities and fraud. Our proposal is clearly to maintain for the 2014-2020 PO the eligibility of expense and the requirement of financial audit activity.

We believe that with previous studies, we come with more knowledge, because we did not notice the existence of similar research on the documentation. Of course, the study undertaken also presents limits, generated, first of all, by the lack of data or their presentation in a less satisfactory way for the present research. A possible direction of research on the subject could be reflected in an analysis of the audit reports of the financial auditors of the projects for the new 2014-2020 programming period.

References

1) Botez, D. (2012a). Auditor's intervention on non-reimbursable structural funds (Intervenția auditorului privind fondurile structurale nerambursabile). *Studia Universitatis Petru Maior Series Oeconomica*, [online] 6(1), pp. 24-38. Available at: http://oeconomica.upm.ro/OVI/24-38DanielBotez.pdf [Accessed 01.03.2018].
2) Botez, D. (2012b). Experiences and suggestions on documenting structural fund audits (I and II), (Experiențe și sugestii privind documentarea auditării fondurilor structurale - I și II). *Audit Practices,* no. 3 and no. 4, pp. 21-24.
3) Burja, V. and Jeler (Popa), I. (2018). The Control of the Implementation and Management of European Funds. *Academic Journal of Economic Studies*, Faculty of Finance, Banking and Accountancy Bucharest, "Dimitrie Cantemir" Christian University Bucharest, 4(1), pp. 89-93.
4) Chamber of Financial Auditors in Romania - CFAR, (2014a). *Collaboration protocol on the organization and conduct of financial audit activity for European funds and other non-reimbursable funds from other donors (Protocol de colaborare privind organizarea și desfășurarea activității de audit financiar pentru fonduri europene și alte fonduri nerambursabile de la alți donatori).* [online] Available at: http://www.cafr.ro/uploads/Protocol%20MFE-3454.pdf (currently abrogated) [Accessed 02.02.2018].
5) Chamber of Financial Auditors in Romania - CFAR, (2014b). *Some clarifications on standards applicable to auditing projects funded by European funds (Unele clarificări cu privire la standardele aplicabile în auditarea proiectelor finanțate din fonduri europene).* [online] Available at: http://www.cafr.ro/pagina.php?id=141 [Accessed 02.02.2018].
6) Council Regulation (EC) no. 1083/2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion

Fund. online] Available at: http://www.fsesudest.ro/legislatie /070307r1083RO.pdf [Accessed 03.03.2018].

7) Court of Accounts of Romania, (2010). *Public Report for 2008.* Bucharest: The Romanian Court of Accounts.
8) Court of Accounts of Romania, (2011a). *Public Report for 2009.* Bucharest: The Romanian Court of Accounts.
9) Court of Accounts of Romania, (2011b). *Public Report for 2010.* Bucharest: The Romanian Court of Accounts.
10) Court of Accounts of Romania, (2012). *Public Report for 2011.* Bucharest: The Romanian Court of Accounts.
11) Court of Accounts of Romania, (2013). *Public Report for 2012.* Bucharest: The Romanian Court of Accounts.
12) Court of Accounts of Romania, (2014). *Public Report for 2013.* Bucharest: The Romanian Court of Accounts.
13) Hațegan, C.D. (2013). Study on the financial audit activity for the verification of European projects in Romania (Studiu privind activitatea de audit financiar pentru verificarea proiectelor europene în România). *Financial Audit*, Year XI, 102(6), pp. 3-10.
14) IAASB, (2013). *International Quality Control, Audit, Review, Other Insurance and Related Services (Manual de Reglementări Internaționale de Control al Calității, Audit, revizuire, Alte Servicii de Asigurare și Servicii Conexe)*, vol. I and II, Bucharest: CFAR.
15) Kameniczki, C. (2009). Auditor's responsibility in auditing projects with domestic and international funding in Romania (Răspunderea auditorului în auditarea proiectelor cu finanțare internă și internațională în România). In: *National and international financial audit activity. Auditors and the global economic crisis (Național și internațional în activitatea de audit financiar. Auditorii și criza economică globală),* Second Congress of Financial Auditors of Romania. Bucharest: ELFI Publishing House, pp. 638-647.
16) Mataragiu, C., Oșanu, O., Grapini, A.C., Chereji, A. and Untariu, A. (2013). *Audit of Structural Funds - step by step (Auditul fondurilor structurale – pas cu pas).* Bucharest: Datagroup Publishing House.
17) Ministry of Regional Development, Public Administration and European Funds, (2017). *Request for termination of collaboration protocol on the organization and conduct of the financial audit activity for European funds and other non-reimbursable funds from other donors.* [online] Available at: https://www.cafr.ro/uploads/Rezilierea%20Protocolului%20de%20colaborare%20CAFR%20%E2%80%93%20MFE-8ed3.pdf [Accessed 15.03.2018].
18) Staicu, E. (2014). *Auditors on European funds and other non-reimbursable funds: How to obtain certification (Auditori pe fonduri europene și alte fonduri nerambursabile: Cum se obține certificarea).* [online] Available at: http://legestart.ro/auditori-pe-fonduri-europene-si-alte-fonduri-nerambursabile-cum-se-obtine-certificarea/ [Accessed 20.03.2018].
19) Șerban, M. (2012). Audit of European projects - from theory to practice (Auditarea proiectelor europene – de la teorie la practică). *Audit Practices,* 4, pp. 13-19.

20) Şerban, M. (2014). Auditing European Funds – Comparisons between ISRS 4400 and ISA 805 (Auditarea fondurilor europene – comparaţii între ISRS 4400 şi ISA 805). *Audit Practices,* 3(11), pp. 13-17.
21) Şuteu, A. (2013). Audit of European structural funds - agreed procedures (Auditul fondurilor europene structurale – proceduri convenite). *Audit Practices,* 2(6), pp. 19-28.
22) Şuteu, A. (2015). Reflections on ISA 805 from the Audit of European Funds 2014-2020 (Reflecţii privind ISA 805 din perspectiva auditului fondurilor europene 2014-2020). *Audit Practices,* 3(15), pp. 43-52.

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THE FIFTH ELEMENT. PUBLIC BUDGETS AND VALIDITY OF PUBLIC CONTRACTS

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Abstract
A well-established legal routine seems to have neglected to consider the legal analysis of the relation between the budgetary allocations from public funds and the contracts by which specific payment obligations are undertaken by public sector entities. The analysis of this necessary relationship between budgetary allocations and contractual obligations, of its underlying principles and ensuing consequences, is likely to emphasize specific causes of nullity of the contracts entered in disregard of this relationship. This contribution proposes a review of certain cases when either the contract that is entered into or amended without due consideration to the budgetary allocations, or the award procedures organised for such contract, may not be valid, focusing on the legal consequences as well as exploring potential remedies.
Keywords: *public contracts, public budgets, conditions for contract validity, contract award procedures, contract nullity, condition precedent.*
JEL Classification: K10, K23, K29

1. PRELIMINARY CONSIDERATIONS

A recurrent practice of certain Romanian contracting authorities, seemingly building up in the last couple of years, is to launch award procedures for public works contracts whilst leaving aside any concerns on available budgets. In a somewhat counter-intuitive manner, such practice of launching contract award procedures without budget coverage is not used in the procurement of low value goods or services, but merely in the procurement of major works, especially road infrastructure works. A possible reason for what appears to be a risky choice for any contracting authority is precisely the relatively long duration of the award procedures for such contracts. The contracting authorities may consider that enough time is available for them during the contract award procedure to complete also the procedures required for budgeting the amounts needed for the future contractual payments. Consequently, the contracting authorities often decide to combine both time-consuming procedures – budget approval and contract award – into a single timeline, by organising and starting the contract award procedure without a budget coverage approved for the payments ensued by such intended contract, whilst undertaking to complete during the award procedures the necessary steps for obtaining the financing for the same contract.

Any failure of the contracting authority to ensure the financing of the contract for which it launched a competitive award procedure further results in the annulment of such procedure.

Fully aware of the imperative provisions in the Law no. 500/2002 on public finances [1] requiring the pre-existence of budgetary allocations prior to undertaking any payment obligations that are to be further executed from public funds, contracting authorities are attempting to ensure compliance of such practice of organising contract award procedures without budgetary coverage with the above mentioned legal requirements, by inserting in the award documentation the legal artifice of a condition for the completion of the procedure.

Moreover, such practice was somehow prepared by the recurrent practice of modifying public works contracts without first ensuring the necessary budgeting of the funds needed for the additional payments entailed by such amendments to the amount and value of works. Where the contracts for performance of works allowed for the works supervisor, acting as a representative of the beneficiary, to accept changes to the scope of works as required and justified by the contractor, such changes were accepted based on the contract provisions, without due care to the availability of budget allowances for any additional payments thus occasioned. Further to such changes in the scope of works approved according to contractual procedures, if additional payments by the beneficiary were required, the latter was supposed to procure first a contractual document attesting such payments – i.e. an additional act to the initial contract. Yet, the mere execution of such additional act required a prior budgetary allowance. When the budget of the contracting authority could not be supplemented to cover the additional payments, the beneficiary, under the applicable imperative legal provisions, could not legally make either the additional act or the payment itself. Such apparent conflict between the contractual terms and the imperative legal provisions has been in the last years solved by the courts, mainly arbitral courts, several final decisions imposing to the beneficiary the obligation to pay the additional amounts occasioned by contract amendments, despite the absence of budgetary allowances. From a legal perspective, such solution, albeit totally unfavourable to the contracting authorities, dwells on the fact that for payment obligations imposed by final and irrevocable court decisions the budgetary allowance has to be budgeted after the issuance of such court decision (and not prior to the voluntary undertaking of any payment obligation, as in the general rule).

All these cases emphasise the need for an analysis of the legal effects that result from the legal ban on entering contracts providing payments from public funds without a prior adequate budget authorisation in the form of engagement credits (Bouvier, Esclassan and Lassale, 2016).

2. NO CONTRACT WITHOUT BUDGET

In a quite general manner, both Romanian public finances laws – i.e. Law no. 500/2002 on public finances and Law no. 273/2006 on local public finances – cast the idea that no engagement of public funds may be in place without the proper budgeting of the funds required for the payments deriving from such engagement (Rațiu, 2008, p. 208). According to art. 14(3) of the Law no. 500/2002 on public finances *„No expense from public funds may be undertaken, ordinanced and paid unless approved according to the law and inserted into budget*", whilst according to art. 14(3) of the Law no. 273/2006 on local public finances *„No expense from public funds may be undertaken, ordinanced and paid unless approved according to the law, inserted into budget and linked to financing sources*.". Such prior authorisation is similarly required under French law (Collet, 2016, pp. 446-447; Bouvier, Esclassan and Lassale, 2016, p. 431; Oliva, 2015, pp. 114-115).

In the terms of both laws, each of the three steps of the public expenses restated therein – undertaking (engagement), ordinancing and payment of expenses – are subjected to the budgeting of the entire amount of the proposed expenses. The engagement of public expenses is defined by both public finance laws as being the phase of the budgetary execution process whereby a public entity undertakes the obligation to pay an amount of money as a result of the fulfilment of the conditions provided by a legal engagement [2]. Both public finances laws are defining the legal engagement as the legal deed by which may be undertaken or acknowledged payment obligations to be further discharged from public funds [3].

As in most cases the legal deeds by which a public entity undertakes payment obligations (such obligations to be further discharged from public funds [4]) are contracts, the validity conditions generally provided by art. 1179 (1) of the Civil Code for all contracts, including for administrative contracts (Tarangul, 1944, p. 484), shall be applicable in all cases. Nevertheless, the general validity conditions for any contract shall be supplemented by an additional condition in case of contracts that are also engagements, i.e. the condition of appropriate budgeting. More precisely, in case of contracts by which an entity financed from public funds undertakes payment obligations, such obligations to be further discharged from the public funds, the existence of sufficient budget allocations to cover the payment obligations, prior to the execution of the contract, shall be a mandatory condition for the validity of such contract.

This additional validity condition shall be required only when the contracts provide payment obligations undertaken by entities financed from public funds, as only in such cases the provisions of the public finances law concerning the mandatory budgeting prior to engagement (contract) are applicable.

If appropriate budgeting prior to the execution of such publicly funded contracts is a validity condition, its absence should normally trigger the nullity

of the respective contract. Although such legal consequence of the failure to observe the mandatory legal requirement concerning the prior budgeting of payment obligations may be easily derived from the general principles of nullity, the specific legal provisions of the public finances laws remain silent in this respect. Moreover, Romanian law does not provide specific rules for the nullity of public contracts that could be seen as derogatory from the Civil Code general rules. The theories developed by the Romanian legal doctrine as concerns the various levels of nullity of the administrative acts (Apostol Tofan, 2016, pp. 80-88) may inform a challenge of the validity of any contract for which a public entity failed to observe a mandatory legal requirement (Ciobanu, 2015, pp. 106-107), i.e. failed to ensure proper budgeting for the payment obligations deriving from such contract. Further, the administrative legal doctrine is far from being unitary as concerns the existence of the two types of nullity – absolute and relative nullity – in relation to administrative acts, similar to civil acts (Clipa, 2012, pp. 43-44). Should any such distinction be considered in the case of failure to budget a contractual payment obligation, the nullity thus implied shall be of an absolute nature, as the budgeting requirement provided in art. 14(3) of both public finances law is meant to protect the general interest.

Due to the serious legal consequences of the failure to provide sufficient budget coverage for the payment obligations that may be undertaken by contract by a public or quasi-public entity, this issue of budgeting becomes utterly important for the (private) contractor, as it cannot be longer perceived as an internal aspect concerning solely the public entity. Actually, this is the major change of paradigm that is the outcome of recognising the legal consequences of the requirement of prior budgeting: the change of the prevailing perception on the public finance rules and principles, from an entirely „public" issue, related exclusively to the internal functioning of a publicly funded entity and thus of no concern outside the public sector, to a validity condition of the acts (deeds) entered into or issued by such public entity and, consequently, of major concern for the creditor of any payment obligation assumed under such act (contract).

Somehow surprising, the practice of courts and administrative jurisdictions is advancing at a quite slow pace towards such change of perception of the legal value and ensuing effects of the requirement that any legal engagement of payment obligations from public funds has to be mandatorily preceded by full coverage by at least engagement credits included in the prevailing budget.

Confronted with a shortage of funds allocated for investment expenses, the Romanian public company entrusted with the administration of motorways as well as some local municipalities have piloted a special „structure" of the award procedures organised in respect of several works contracts, in an attempt to bypass the prior budgeting requirement or at least save some time by conducting in parallel both the procedure for budgeting the value of the contract and the contract award procedure. As the available budgeted funds were not sufficient to

cover the estimated value of the intended works contract, which means that not enough engagement credit for such contract was approved in the budget, the contracting authority could not enter the contract. Consequently, the practical question occurring for the contracting authority was whether it could proceed further with the contract award procedure although it was obvious at that moment that the contract could not be signed once the winning bidder is selected. In the absence of any detailed instructions or limitations in the applicable legal provisions, the answer given by the contracting authority to such question was „yes". Without any explanation for its decision, as revealed further during the jurisdictional procedure in front of the National Council for Solving Complaints (NCSC) [5], the contracting authorities which chose this solution have started the contract award procedures in the absence of any budgeting of the estimated value of the contract. The potential bidders were informed of this lack of funding and reference was generally made in the award documentation to the fact that the contracting authority has started the procedures for obtaining the required funding. The legal structure was completed by the insertion in the award documentation of a condition stating that in case the funding required for the contract could not be obtained, the award procedure shall be annulled for circumstances preventing the execution of the contract (the reason for annulment of an award procedure provided by art. 212 (1) lett. (c) second thesis of the Law no. 98/2016 on public procurement contract [6]. Most of the award documentations challenged before NCSC included the following terms:

„The completion of the public contract award procedure is conditional upon the following cumulative conditions precedent:

(1) The execution of the public contract is conditional upon the Contracting Authority obtaining the financing/approval of financing of the works from state budget funds and/ or non-reimbursable EU funds, and the execution of the contract shall take place only when all legal provisions applicable to the engagement of expenses from budgets subjected to public finances regulations. In case when, irrespective of reasons, the financing/approval of financing of the works from state budget funds and/ or non-reimbursable EU funds is not obtained, the Contracting Authority shall apply the provisions of art. 212 alin (1) lit. c) second paragraph of the Law 98/2016,as the award of the public contract is impossible."

Challenged before NCSC by the bidders, which in most cases required that the contracting authority is forced to replace the resolutory condition affecting the award procedure (which was, however, drafted as a condition precedent to the completion of the award procedure) with a condition precedent to the execution of the contract with the winning bidder, such conditional award procedure was reviewed by the review body from a rather formal, public procurement perspective, which failed to give full effect to the legal interpretation of the budgeting requirement provided by art. 14(3) in both public

finances laws. The result, as deriving from the NCSC constant jurisprudence [7], is a set of decisions stating that a contract award procedure conditional on the successful completion by the contracting authority of the procedures for obtaining the funds for the respective contract is not in breach of any imperative legal provision and is therefore valid. Yet the NCSC arguments for constantly reaching this conclusion, although most probably deemed to be state-of-the-art as they are repeated as such in all decisions, are both shallow and incomplete.

As an administrative jurisdictional body, NCSC hereby missed an important opportunity to clarify the role of the financing and of its budgeting as an essential component of any public procurement procedure. The other entity that had issued an opinion on this type of „conditional award procedure", ANAP – the National Public Procurement Agency, as the „*ex ante*" supervisor of the public procurement activities in Romania, did not question the validity of such procedure in its turn, except for the case when the completion of the required funding and budgeting may be deemed as being discretionary as concerns the contracting authority. To avoid such unlimited freedom reserved for the contracting authority in the award documentation, an ANAP position document, issued most probably during the ex-ante verification of the award procedures that were further challenged before NCSC, pointed out that the contracting authorities should „*Pay attention to the initiation of a public contract award procedure including a „condition precedent" clause stating that the execution of the contract shall be conditional upon the existence of the funding required for the acquisition further to the execution of the financing agreement – such clause shall not allow to the contracting authority an unlimited freedom of decision prior to the execution of the contract (in cases such as no diligence was made, or the chances are low for obtaining the required financing), taking into consideration that art. 143 of GD no. 395/2016 provides the obligation of the contracting authority to execute the contract with the bidder whose offer was determined as the winning bid.*" [8]

3. PRIOR BUDGETING REQUIREMENT AND CONTRACT AWARD PROCEDURES

The main argument for the NCSC rationale sustaining the validation of a conditional award procedure was the requirement of prior budgeting of any engagement (i.e. obligation to pay assumed by an entity financed from public funds), as provided in art. 14(3) of both Public Finance Law and Local Public Finance Law. Based on such explicit legal requirement, the NCSC decisions acknowledged that the contracting authority couldn't execute a contract without having budgeted the funds required for its performance. From such interdiction, the NCSC decisions further infer that the contracting authority could not have organised an award procedure whereby the contract with the winning bidder would have been executed subject to the condition precedent of obtaining the

financing. NCSC thus upheld the argument submitted by the contracting authority that a contract signed further to an award procedure but subject to the condition precedent of available financing being obtained (and budgeted) would potentially cause negative consequences for its parties in case the financing is not available.

It is surprising that the review body did not question at all the validity of the contracting authority's decision to put in place an award procedure in the absence of available funds. If the sole outcome and also the explicit aim of any award procedure is to select a contracting partner with whom a specific contract shall be entered by the contracting authority, could it be sustained that the interdiction for the latter to enter such contract, irrespective of the reason for the interdiction (hereby, the absence of engagement credits in the budget), has no impact on the validity of the underlying award procedure? Are the contract and the contract award procedure separated in such a manner that the procedure may be organized although it is obvious upon its commencement that the contract cannot be entered?

On a more theoretical level, the question arises as concerns the effects of the prior budgeting requirement. If the legal provision explicitly bans the execution of a contract without prior budgeting the funds required for discharging the payment obligations under such contract, is the ban to be extended to contracts entered subject to a budgeting condition precedent and also to an award procedure for such contract?

The review body also failed to refer to such questions, undertaking what seems to be a merely empiric analysis. Based on the explicit ban on contracting in the absence of budgeted funds, it further implicitly built its (repeated) decision on the limited nature of such ban (seen as referring solely to the execution of the contract) as well as on the potential negative effects of the situation whereby a condition precedent of funds availability is not met although the contract would have been signed. In between the two extremes thus described – no contract at all or a contract whose performance is uncertain and which is thus potentially damaging for its parties, the NCSC empirically identified a „middle" solution, namely recognised the validity of an award procedure subjected to the resolutory condition related to the availability of funds. If the condition is not met, i.e. the funds are not obtained by the contracting authority, the award procedure shall be rescinded and the contract shall not be signed at all. In all cases, the NCSC decisions fail to refer to any time limit for the acknowledgement of the funds unaivalibility and the anulment of the award procedure. This may mean that the winning bidder could be kept waiting for a significant period after its designation, until the contracting authority has a confirmation of availability or, as the case may be, unavailability of funds. In the latter case, the contracting authority may simply invoke the „imposibility to execute the contract" as reason

for the annulment of the award procedure. The risks and costs of maintaining an offer throughout an uncertain period are thus allotted to the winning bidder.

Such empiric solution is however lacking any legal rationale, as it fails to analyze the legal effects of the ban on contracting in the absence of proper budgeting. Even from an economic perspective, the only benefit of organising an award procedure in the absence of available funds is time saving, as the award procedure and the budgeting procedures could presumably be completed in the same time, so by the time of determining the winning bidder or otherwise completing any of the final stages of the procedure, the required funds would also be secured, thus enabling the contracting authority to execute the contract. Yet any such benefits in terms of time may be easily overpassed by the negative effects of the uncertainty in obtaining the funds. This may amount to a relative utility of such solution (i.e. an award procedure subject to the resolutory condition of non-availability of funds) only in those cases when the uncertainty of funding is rather low or inexistent, the availability of funds being merely a matter of time.

However, this economic analysis has to be at all times preceded by the legal analysis of the validity of an award procedure in the absence of prior budgeting. The other question, concerning the validity of a contract entered subject to the condition precedent of availability of funds, may be answered in strict relation to the ban provided in art. 14(3) of the public finances laws, without considering the award procedure as such. If the law explicitly bans a contract entered without proper financing included in the prevailing budget, any contract entered subject to a condition precedent aiming at the disappearance of the reason for the ban would fall under the same ban. Despite the generality of the legal provision, the absence of the necessary funds and the ensuing ban on contracting cannot be bypassed by entering a contract that cannot be performed due to the absence of funds. As the *pendente conditione* effect of the condition precedent in this case is to completely prevent the performance of the contract, even if the contract entered into force upon its execution, this amounts to the same effects as it the contract would not have been executed at all. Consequently, a contract cannot be executed (i.e. signed) in the absence of corresponding engagement credits in the relevant budget.

A possible explanation for the conditional solution imagined by the contracting authorities and further implicitly upheld by NCSC [9] is the quite commonly misrepresentation of the *pendente conditione* effects of a condition precedent inserted in a contract, deemed to be rather radical, i.e. to prevent the very entry into force of the contract and not „solely" to prevent the performance of the obligations affected by such condition precedent (as actually provided by art. 1400 of the Romanian Civil Code).

The main legal question common to the cases submitted before NCSC and analysed herein refers to the validity of an award procedure designed for a

contract that cannot be signed. As the reason for the mandatory explicit ban on contract execution may cease to exist, i.e. the required engagement credits may be inserted in the contracting authority's budget, the question may be reduced to whether such reason for the ban is likely to disappear before the end of the award procedure and thus prior to the actual execution of the contract. One may correctly assume that the award procedure could not be extended beyond its normal stages provided by the applicable regulations, to include any period required for the contracting authority obtaining the funds, as such activity is not considered by the Remedies Directives as part of the contracting authority's endeavors to select a contracting partner. Such extension of the award procedure would be artificial and potentially able to impede on the full application of the principles governing the procedure.

If the completion by the contracting authority of the required steps for obtaining the financing for the contract is not seen as part of the award procedure, but merely as a separate activity, it follows that it has to be completed before the end of the award procedure so as to ensure that the contract may be signed with the winning bidder, absent any other reason that may prevent such execution. As the explicit interdiction is placed by art. 14(3) of both public finances laws on the execution of the contract (i.e. the legal engagement of an expense to be discharged from public funds) in the absence of budgetary coverage, and also considering that the final act of the contract award procedure is the execution of the contract, the funds have to be budgeted before the execution of the contract, i.e. before the end of the award procedure. Any uncertainty as to the positive outcome of the contracting authority's endeavors to obtain the necessary financing and, moreover, any possible interference of the contracting authority with such endeavors that may (negatively) influence such outcome are sufficient reasons to doubt the validity of an award procedure that may be thus deemed to aim at a contract which cannot be signed.

The absence of a valid aim for the contract award procedure is a serious reason that may affect its validity. If the existence of budgeted engagement credits as of the moment when the contract may be executed further to the completion of the contract award procedure (the actions to ensure such budgeting not being included in the contract award procedure) is uncertain, the very aim of the procedure becomes uncertain, thus affecting the validity of the procedure itself. The possibility to launch a contract award procedure in the absence of necessary funds may only be limited to those cases when there are no uncertainties related to the budgeting as it may be completed before the end of the award procedure.

4. CONCLUSIONS

The validation by the national review body (NCSC) of a „innovative solution" aimed at bypassing a legal interdiction, without a thorough legal

analysis of the effects such interdiction to enter public contracts without proper budgeting has on contract award procedures, may prove to contradict such imperative legal provisions. One possible explanation of this failure to capture the legal effects of an imperative legal provision is the fact that the latter is stated in the public finance regulations, whose extended application outside the boundaries of what is perceived as a public finance issue is commonly overlooked. Yet this explicit interdiction to contract without budget, provided in both public finance laws, has serious legal effects, that need to be further explored, and its breach may trigger the nullity of the contract or of the contract award procedure. Due to its application to all contracts by which an entity financed from public funds undertakes payment obligations, the condition of prior budgeting may be qualified as the fifth validity condition for such contracts, in addition to the four general validity conditions provided by the Civil Code for all contracts. Consequently, such legal analysis should inform any future decision to be made by NCSC, as review body for public procurement procedures, as well as by the courts, rather than the repetitive, unreasoned, NCSC decisions analysed herein. Alternatively, any legal analysis of the obligation for the entities financed from public funds to undertake payment obligations only within the value limits set by the engagement credits approved within their relevant budget, may consider whether such obligation may be construed as a limitation to their capacity (power) to enter into contracts. Whether it is deemed as a limitation to their power to contract or as a separate validity condition for the contracts entered by entities financed from public funds, the prior budgeting has a potentially major impact on the validity of the contracts by which entities financed from public funds undertake payment obligations.

NOTES

[1] Art. 14(3) of the Law no. 500/2002 on public finances, as further amended, and art. 14(3) of the Law no. 273/2006 on local public finances, as further amended.

[2] Art. 2 para 3^2 of the Law no. 500/2002 on public finances and art. 2 para. 3 of the Law no. 273/2006 on local public finances.

[3] Art. 2 para 3 of the Law no. 500/2002 on public finances and art. 2 para 3 of the Law no. 273/2006 on local public finances.

[4] This empahsys of the fact that the source for payment shall be any funds that may be qualified as public under the applicable public finance regulations is important, as only in such case the prior budgeting of the entire amount needed for such payment is mandatorily required under the analysed provisions of the public finances laws.

[5] The National Council for Solving Complaints (Consiliul Național pentru Soluționarea Contestațiilor) is the national administrative-jurisdictional authority acting as review body for the purpose of Directive 89/665/EEC as amended by Directive 2007/66/EC on review procedures concerning the award of public contracts.

[6] Transposing into Romanian law Directive 2014/24/EC on public procurement contracts.

[7] NCSC decisions published in BO2017-4505, BO2017-4509, BO2017-4581, BO2017-4118, BO2017-4731.

[8] ANAP notification to contracting authorities no. 256/2016, not published, as invoked by the NCSC decisions mentioned at 8 above.

[9] The decisions mentioned above do not question the validity of such choice, as it is rejected solely based on a risk argument, as being potentially generator of negative consequences for the parties in case the condition precedent is not met and the funds are not obtained by the contracting authority.

References

1) Apostol Tofan, D. (2016). *Drept administrativ (Vol. 2).* 3rd ed. București: C.H.Beck.
2) Bouvier, M., Esclassan, M.-C. and Lassale, J.-P. (2016). *Finances publiques.* Paris: LGDJ.
3) Ciobanu, A. (2015). *Drept administrativ.* București: Universul Juridic.
4) Collet, M. (2016). *Finances publiques.* Paris: LGDJ.
5) Clipa, C. (2012). Considerații cu privire la regimul juridic al anulabilității actului administrativ. *Revista de Drept Public*, 4/2012, pp. 43-45.
6) Oliva, E. (2015). *Finances publiques.*3rd ed. Paris: Sirey.
7) Rațiu, M. A. (2008). *Drept financiar public. Drept bugetar.* București: C.H. Beck.
8) Tarangul, E. D. (1944). *Tratat de drept administrativ.* Cernăuți: „Glasul Bucovinei".

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ENSURING INTEGRITY IN ROMANIA'S PUBLIC PROCUREMENT

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Abstract
Public procurement has always been a sensitive issue in Romania because the spending of public money was done inefficiently due to an array of factors such as corruption, lack of knowledge or of political will. The new EU directives on public procurement have forced all EU member states, including Romania, to improve their legislation in order to avoid unlawful behaviour and enhance integrity in the public procurement procedures. However, these new provisions cannot improve integrity by themselves but should be corroborated with other administrative and penal rules in order to achieve it. This paper presents some of these provisions that combined, should make public procurement "cleaner".
Keywords: *public procurement, integrity, public sector, corruption.*
JEL Classification: H570

1. INTRODUCTION

Spending public money and serving the needs of a community is one of the staples of public administration. Often, especially in Eastern European countries, this activity has been badly contaminated by corruption, lack of knowledge or of political will to do it properly.

Since 1989, in Romania, public procurement remained an area of public sector that was directly affected by these factors, public spending proving to be often done illegally, inefficiently, being opaque, unnecessary and inopportune.

Over the years, Romanian legislation on public procurement evolved according to the standards and requirements of the European Union (EU). However, no EU Member State has proven 100% efficient in making public procurement corruption-free. In spite of its 40 years old legislation that was periodically improved the EU loses 990 billion euro a year to corruption, including 5 billion euro from public procurement corruption (Collins, 2016). However, the anti-corruption provisions were added to EU legislation only starting with 2012. In fact, the major EU reform on public procurement legislation took place in 2014, inspired by the encouragement and model legislative standards offered by the United Nations, the Organization for Economic Co-operation and Development, the World Trade Organization, and the World Bank.

The new provisions addressed several key issues. These included the prevention of conflict of interests, e-procurement, and the simplification of documentation, and better access to the market for small companies, monitoring and reporting on public procurement activity by member states to ensure the rigorous and uniform enforcement of EU law. Directives 2014/24/EU and Directive 2014/25/EU were essentially intended to more tightly filter out public procurement corruption by using more flexible rules without sacrificing strictness. Member states had until April 2016 to transpose the new provisions but for the e-procurement rules, which can be implemented as late as April 2018.

In essence, the reform was meant to enhance integrity, transparency, accountability, fair competition, professionalism and efficiency of public procurement by reducing bureaucracy and rendering the procedures more flexible and easier to manage and thus, strengthening the functioning of the EU Single Market.

2. ROMANIA'S LEGAL FRAMEWORK

Romania is facing a constant struggle to enhance and keep the integrity of public procurement over the years, much the same of most Eastern European EU Member states. It is true that during the last ten years Romania's legislation has improved but the results of its enforcement were fluctuant due to a cumulus of factors among which the lack of political will and the lack of integrity among public representatives stand out.

The challenge for Romania is to force integrity on public procurement at this point by using a combined variety of penal and administrative provisions that could bring positive results.

Romania has implemented the new, improved public procurement directive. It resulted in a law voted by the Parliament in 2016, Law no. 98, which is applied ever since. The new provisions are meant to simplify public procurement procedures by requiring the use of electronic infrastructure that will be mandatory starting with this year.

E-procurement serves more purposes. First of all, it brings together demand and supply, thus quantifying the needs communities have, their nature and the public money that are spent while tending to these needs. Secondly, it cuts through bureaucracy materialized excessive paperwork, lengthy administrative procedures, bringing transparency into the process and curbing corruption. Thirdly, it will help create databases containing bidders' information regarding their credentials, speeding up the process of verification. Thus, efficiency and control is achieved and indirectly, integrity of the persons in charge with public procurement procedures, since the electronic infrastructure is making the process more transparent. However, automation and software solutions cannot substitute good judgment and experience (Chui *et al.,* 2016).

Also, the new law imposes new, simplified and more flexible procedures that help contracting authorities to better serve the needs of the communities, to respect the timeframes and to spend public money as efficiently as possible without giving them an excuse to justify their lack of integrity by arguing that provisions are too rigid or abusive.

At the same time, the new provisions state that public authorities could exclude bidders on the grounds of "bad reputation". We argue that this rule should be made imperative for contacting authorities in order to force them to delineate themselves from any collaboration with corrupt or fraudulent private entities. This could prevent potential involvement in unlawful activities or just the tarnishing of public representatives' reputation and a lack of trust from the constituents/public even in spite of their sound integrity.

Law no. 98/2016 contains specific provisions (Section 4, Chapter II) that impose the avoidance of conflicts of interest to public servants involved in public procurement activities. However, we believe that the definition given to the conflict of interest in this case is too vague and further improvements are needed in order to avoid false conflicts of interest and to better separate them from the real ones.

Also, Romania can learn from the experience of other EU Member states that excel in good practices in the field of public procurement. Some of these practices include establishing codes of conduct and central authorities for tender and awarding, rotation of staff, clear regulations on sponsoring and the prohibition on accepting gifts, increased use of e-procurement, the use of integrity pacts, black lists or corruption registers, and other similar measures (European Commission, 2014).

However, the integrity of public procurement is not only ensured by the new law on public procurement (Law no. 98/2016) but also, by an array of administrative and criminal law provisions.

Administrative law provisions also sustain the fight for integrity in public procurement and in all public activities in general. For example, rules that impose incompatibility for public representatives, preventing them to manage a business or to have any personal interest in one.

The conflict of interest is addressed separately by administrative and penal law provisions.

Thus, Law no. 7/2004 regarding the Public Servants' Code of Conduct contains provisions referring to the conflicts of interest and the personal interest of a public servant. Also, Law no. 188/1999 that establishes the statutory rules on public servants also imposes obligations to public servants, enforcing incompatibilities meant to bring integrity to public administration services. Law no. 161/2003 complements the above mentioned rules with the ones designed to maintain transparency in the management of public information and services by electronic means (Book I, Title II). The same body of law contains rules in Book

I, Title IV that are meant to further enforce integrity by banning the conflict of interests and imposing incompatibilities to senior public servants and officials while in public office.

At the same time, the Romanian Criminal Code separately incriminates crimes of corruption (i.e. active and passive bribery, traffic of influence, buying influence) and crimes related to being in public office (i.e. conflict of interests, abuse of office). The Romanian Penal Code incriminates in art. 301 the conflict of interests manifested in public sector. The definition is similar to the administrative law one but more precise: the situation in which a public servant in office has made a decision or executed his professional duties generating directly or indirectly material gains for himself, his spouse, a relative or somebody else from his family, up to second degree near relatives, or a person with whom the public servant was engaged in a commercial or professional relationship during the last 5 years, or a person that provides or has provided material gains for the public servant. However, the provisions do not apply to public servants that release, approve or adopt a legislative measure.

3. ENFORCEMENT INFRASTRUCTURE

The enforcement of administrative and penal provisions represents the prerogative of specialized public authorities. The institutional infrastructure that deals with public servant integrity in Romania relies on Romanian National Integrity Agency (NIA) and prosecution authorities, such as the National Anti-corruption Directorate (NAD).

NIA monitors and controls the integrity of public servants in exercising their public duties. Its success was quantified in its annual reports to the point where the EU stated in its 2014 Anti-corruption Report that "the political will to support the independence, stability and capacity of the anti-corruption institutions and the judiciary in Romanian has not been constant" (European Commission, 2014, p.11). However, sometimes the Romanian Parliament actions blocked NIA decisions.

NAD is specialized in prosecuting corruption cases. During the last three years, its reports show an improvement in prosecuting such cases. Enforcing penal law provisions and sanctioning corruption is also a way of tending to integrity in public procurement. Thus, 53% of NAD prosecution cases are based on the abuse of office during the public procurement procedures. To these cases of fraud, embezzlement, forgery and other related crimes were prosecuted. Overall, in 2017, 189 public servants were trialled and 95 million Euros were recovered (National Anti-corruption Directorate, 2017).

The same NAD report shows that in 17 % of the prosecuted cases were reported by individuals or legal persons (National Anti-corruption Directorate, 2017). This raises another concern regarding the willingness of individuals to disclose illegal wrongdoing. In order to encourage such a proactive attitude

towards safeguarding integrity, by law individuals in such cases should be granted extensive protection for themselves and for their families. Whistleblowers protection is vital in strengthening integrity in both public and private sector. Often, enforcing rules to protect these people is a challenge because of the public perceptions of whistleblowers. In spite of it, there are some efficient protection systems created for whistleblowers in Europe and North America. These systems had to overcome two major obstacles: whistleblowers' fear of retaliation and their fear that their disclosure of corruption will be futile.

Romania is one of the few EU member states that have implemented the provisions of a specific EU directive that addresses this issue.

Transparency International (TI) has classified the EU members according to their whistleblower legal framework. According to TI, Luxembourg, Romania, Slovenia and the United Kingdom are the only EU members that have created comprehensive or almost comprehensive whistleblower protection (Transparency International, 2013, p.10).

Romania has enacted Law no. 571/2004 on the protection of employees of public authorities, public institutions and other public entities that report violations of the law. The law aims to protect whistleblowers from any type of retaliation. Unfortunately, the law protects only public employees and, thus, TI ranks it as an "almost comprehensive" legal framework. On the other hand, the legal text comes with an innovative provision that gives equal protection to employees, who are disclosing information directly to the media, activists and other third parties and not to their employers. We believe that the provisions of the law should be extended and also address the protection of whistleblowers in the private sector as well. Thus, there are more guarantees that integrity in public procurement will be safeguarded from all parties involved, whether public or private entities.

Unless protected, employees will not have the courage to serve the common good by disclosing corrupt practices in the public or private sector. Also, facts show that most public servants have no knowledge of the provisions meant to protect them or they do know about them but they prefer not to act for fear of retaliation and lack of protection. Thus, often, the safeguard of integrity remains at the mercy of mass-media investigators and civil society protests.

The new budgetary measures taken by the Romanian Government last year generated a salary raise for certain categories of public servants. This financial incentive could have helped enhance integrity in the public sector and curb corruption even more if it did not put a lot of pressure on public authorities that need to financially support this decision. Some public authorities such as small town city halls do not have the money to support such a salary raise for their employees. Thus, in certain cases, this decision failed to bring positive changes in public sector.

4. CONCLUSIONS

Enhancing integrity in public procurement is a challenging task for Romania since public sector activities have always been susceptible to corruption. Romania transposed the new EU directive on public procurement. However, the new rules will not improve integrity by themselves. Romania also benefits from an array of administrative and criminal law provisions that if properly enforce could bring a state of "normality" to all public sector activities, including public procurement.

References

1) Collins, R. (2016). *Corruption costs EU up to €990 billion a year.* [online] Available at: http://www.politico.eu/article/corruption-costs-eu-990-billion-year-rand-study-fraud-funding/ [Accessed 23.04.2018].
2) Chui, M., Manyika, J. and Miremadi, M. (2016). Where Machines Could Replace Humans – and Where They Can't (yet). *McKinsey Quarterly,* July [online]. Available at: https://www.mckinsey.com/business-functions/digital-mckinsey/our-insights/where-machines-could-replace-humans-and-where-they-cant-yet [Accessed 29.04.2018].
3) European Commission, (2014). *EU Anti-Corruption Report.* [online] Available at: http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/organized-crime-and-humantrafficking/corruption/docs/acr_2014_en.pdf [Accessed 23.04.2018].
4) National Anti-corruption Directorate, (2017). *Raport privind activitatea desfăşurată de Direcţia Naţională Anticorupţie în anul 2017.* [online] Available at: www.pna.ro/bilant_activitate.xhtml?id=40 [Accessed 4.05.2018].
5) Transparency International, (2013). *Whistleblowing in Europe. Legal Protections for Whistleblowers in the EU.* [online] Available at: http://issuu.com/transparency international/docs/2013_whistleblowingineurope_en [Accessed 25.04.2018].

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CONSIDERATIONS ON CIVIL FINE. BETWEEN THE TRADITION OF REGULATION AND THE NEED FOR REFORM

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Abstract
The civil fine is an administrative sanction, which represents a sum of money that the person committing a contravention is obliged to pay and which turns into revenue to the state budget or to the administrative-territorial units. Unlike the criminal fine, the civil one does not result in revocations or prohibitions for the sanctioned persons nor is it a precedent influencing a future sanction. The civil fine may be applied to any offender, natural or legal person, and is the most frequent main civil sanction due to its advantages for the sanctioning body. Currently, Government Ordinance no. 2/2001 stipulates the minimum and maximum limits of the civil fine, depending on the category of normative act, and determines the destination of the amounts resulting from the application of the civil fines. The amounts paid by the legal entities are, as a rule, revenue to the state budget, and the amounts resulting from the fines imposed on the natural persons according to the legislation in force are integral revenue to the local budgets. The article analyses the main controversies in the doctrine regarding the legal amount of the civil fine, the destination of the amounts paid as a fine and the possibility of increasing the fines imposed on the persons with repeated contraventional behaviour.
Keywords: *civil fine; the state budget; local budget; contraventional relapse.*
JEL Classification: K4

1. INTRODUCTION

Administrative-contraventional liability is the main form of administrative accountability, which occurs only in the case of committing an act expressly qualified by a normative act as a contravention (Petrescu, 2009, p. 587). The framework normative act that currently regulates the administrative-contraventional responsibility is the Government Ordinance (hereinafter G.O.) no. 2/2001 on the legal regime of contraventions (published in the "Official Gazette of Romania", Part I, no. 410 of July 25, 2001), as subsequently amended and supplemented.

According to the provisions of Article 1 from GD no. 2/2001, "the act committed guiltily, established and sanctioned by law, ordinance, by decision of the Government or, as the case may be, by a decision of the local council of the commune, city, municipality or sector of Bucharest, of the county council or of

the General Council of the Municipality of Bucharest constitutes a contravention".

Given the existence of a legal definition of contravention, relatively few definitions of this legal concept can be identified in the doctrine. Some authors have defined the contravention by reference to the definition of the offense precisely to further highlight the link between criminal law and the so-called "contravention law". In such an approach, in a recent opinion, the contravention was defined as "an act provided by the contravention law, committed with guilt, unjustified and imputable to the person who committed it, this being the sole basis of contravention liability" (Dinescu, 2016, p. 15).

The contravention can be committed through an action or inaction that puts a certain social value at risk, such as: public order, human life and health, the environment (Alexandru, Cărăușan and Bucur, 2009, p. 395). The sanctioning of the contravention is made regardless of the form of the guilt, and an eventual exception of non-sanctioning of the deeds committed guiltily must be expressly stipulated in the normative act that establishes and sanctions the contravention (Apostol Tofan, 2015, p. 363).

The lawfulness of contravention sanction is one of the aspects of the principle of lawfulness in contraventional matters. This means the possibility of applying the contravention sanctions established by normative acts, as well as the drafting and issuing of those contraventional norms in compliance with the stipulations stipulated by the legislator (Vedinaș, 2015, p. 308).

2. CONTRAVENTIONAL SANCTIONS

Contraventional sanctions represent a category of legal sanctions that apply to natural or legal persons guilty of committing contraventions (Trăilescu, 2008, p. 343).

The finding and application of contraventional sanctions must respect the following principles: a) the principle of the lawfulness of contraventional sanctions; b) the principle of establishing contraventional sanctions compatible with the moral-legal conception of the society; c) the principle of individualisation of contraventional sanctions; d) the principle of the personality of the contraventional sanctions; e) the principle of the uniqueness of the application of contraventional sanctions (Hotca, 2012, p. 109).

According to other authors, Article 5 paragraphs (4) - (7) of G.O. no. 2/2001 establishes, explicitly or implicitly, three principles for the application of contraventional sanctions: a) the principle of legality; b) the principle of proportionality; c) the principle of *non bis in idem* (Podaru, Chiriță and Păsculeț, 2017, pp. 65-66).

Under the contraventional sanctions, G.O. no. 2/2001 distinguishes between primary contravention sanctions and complementary contravention sanctions. For one and the same contravention only a main contraventional sanction and

one or more complementary sanctions can be applied. In accordance with Article 5 paragraph (5) from G.O. no. 2/2001, "the sanction established must be proportionate to the degree of social danger of the deed committed".

The main contraventional sanctions are: the warning; the civil fine; providing community service.

According to Article 5 paragraph (3) from G.O. no. 2/2001, the complementary contraventional sanctions are the following: "a) seizure of the assets destined, used or resulting from contraventions; b) suspension or cancellation, as the case may be, of an opinion, agreement or authorization to engage in an activity; c) closure of the unit; d) blocking the bank account; e) suspension of the activity of the economic operator; f) withdrawal of the license or of the approval for certain operations or for foreign trade activities, temporary or permanent; g) abolishing works and bringing the land to its original state."

By their nature and denomination, this type of contraventional sanctions can only be applied together with a main contraventional sanction and only if the normative act by which the contravention is established provides for this, specifying the contravention sanction to be applied.

Most complementary contraventional sanctions apply to a legal entity offender.

3. CIVIL FINE

3.1. Content and legal nature

The civil fine is an administrative sanction, which represents a sum of money that the person committing a contravention is obliged to pay and which is turned into revenue to the state budget or to the administrative-territorial units (Săraru, 2016, p. 218). The legislator's mention of the administrative nature of this sanction was judged positively in the doctrine "so that its own identity can be established from the beginning and not mistaken for with the criminal fine" (Petrescu, 2009, p. 597).

Unlike the criminal fine, the civil fine does not attract waivers or prohibitions for the sanctioned persons and it is not an antecedent influencing a future sanction (Vedinaş, 2015, p. 31).

The civil fine may be applied to any offender, a natural or legal person. This sanction is the most frequent primary contraventional sanction, with several advantages, such as the existence of precise criteria for determining liability; the possibility of proportioning the sanction between the minimum limit and the maximum limit; the easy procedure of enforcement (Apostol Tofan, 2015, p. 378).

G.O. no. 2/2001 stipulates the minimum and maximum limits of the civil fine, depending on the category of normative act, and determines the destination of the amounts coming from the application of the civil fines. These limits can

be overcome only by normative acts with a legal force at least equal to the Government Ordinance (Apostol Tofan, 2015, p. 378).

The finding agent cannot exceed the maximum limits of the civil fine, even in the case of repeat contravention behaviour of the offender, because the contraventional regime does not know the relapse (Dinescu, 2016, p. 68). The limits of the civil fine are lawful, so that in case of individualization of the amount of the fine imposed, the court "cannot apply a fine below the legal minimum because it would have violated the principle of the lawfulness of the contraventional sanctions, and there can be no sanction outside the legal limits" (Pap, 2017, p. 29).

According to Article 8 paragraph (2) from G.O. no. 2/2001, the minimum limit for the civil fine is 25 lei, and the maximum limit cannot exceed:

a) 100,000 lei, in the case of contraventions established by law and ordinance;

b) 50,000 lei, in the case of contraventions established by Government Decisions;

c) 5,000 lei, in the case of contraventions established by decisions of the county councils or of the General Council of the Municipality of Bucharest;

d) 2,500 lei, in the case of contraventions established by decisions of the local councils of communes, cities, municipalities and sectors of Bucharest Municipality.

The analysis of the Romanian legislation on the legal regime of contraventions allowed the observation that the level of the civil fines was directly related to the social and economic realities of the Romanian society. The doctrine pointed out that "the general limits of the civil fine should be correlated with those of the criminal fine and the average level of the income on economy achieved by a person through licit means" (Mihăilescu, 2013, p. 155).

Regarding the destination of the amounts resulting from the civil fines applied, Article 8 paragraph (3) from G.O. no. 2/2001 distinguishes between fines imposed on legal persons and fines imposed on natural persons. The amounts paid by legal entities are turned, as a rule, into revenue to the state budget, except for the fines imposed by the local public administration authorities and the fines on the circulation on the public roads, which are turned into integral revenue to the local budgets.

Amounts resulting from fines imposed on individuals in accordance with the legislation in force are turned into integral revenue to local budgets. The "local budget" represents the budget of the administrative-territorial unit in which the offender natural person resides or where the legal person sanctioned for a contravention has his / her tax domicile (Podaru, Chiriță and Păsculeț, 2017, p. 90).

For the contraventions committed by juveniles who have reached 14 years, the minimum and maximum of the fine set in the normative act for the committed deed is halved.

3.2. Applying and enforcing civil fines

The enforcement of the contraventional sanction is the responsibility of the finding agent if the competence of another body has not been provided by the normative act by which the contravention was established and sanctioned. Where the finding agent is not entitled to apply the contraventional sanction, the report of finding shall be immediately sent to the body or person competent to apply the sanction. In this case, the sanction shall be enforced by written resolution on the report.

If the same person has committed several offenses, one sanction applies for each of them. According to Article 10 paragraph (2) from G.O. no. 2/2001, when the contraventions have been established by the same reports, the contraventional sanctions for minor offenses accumulate without exceeding the double of the maximum fine provided for the most serious contravention or, as the case may be, the maximum set for the provision of a community service.

When the sanction applied is a civil fine, or when the offender has been compelled to pay compensation, the *payment notification* will be handed in or communicated together with the report. According to Article 25 paragraph (3) from G.O. no. 2/2001 the notification of payment will make a mention regarding the obligation to pay the fine or the indemnification within 15 days from the communication, otherwise forced enforcement will be carried out.

The Romanian contraventional legislation regulates the *ablation system*, provided this possibility is expressly mentioned in the normative act on the establishment of contraventions (Cătană, 2017, p. 426). In the doctrine it was pointed out that "this system establishes a right for the offender and an obligation for the finding agent, which concerns both the disclosure of this legal facility and the involvement of the finding agent in the practical implementation of the ablation system" (Vedinaş, 2015, p. 320).

Specifically, ablation means the offender's possibility to pay, on the spot or in no more than 48 hours from the date of the conclusion of the report or, as the case may be, from the date of its communication, half of the minimum fine provided for in the normative act. In accordance with Article28 paragraph (1) from G.O. no. 2/2001, the finding agent shall make mention of this possibility in the report.

The payment of half of the minimum fine within 48 hours does not equal the recognition of guilt and the impossibility of contesting the report of the application of the contraventional sanction. For example, in the judicial practice it was emphasized that "the sustenance of the appellants Braila Financial Guard cannot be considered in this case, that by paying within 48 hours the amount of

10,000 lei, the petitioner S. would have acknowledged the contravention, the petitioner acting so by thinking of not producing a further damage, equivalent to the payment of the entire amount of 100,000 lei which was imposed as a contraventional fine" (Pap, 2017, p. 83).

The ablation also applies when the civil fines have accumulated as a result of the finding by means of the report of several contraventions, in relation to which the offender could pay half of the minimum fine provided for by the normative act for each of the found contraventions, without exceeding by total the maximum prescribed for the most serious contravention. These provisions of Article 29 from G.O. no. 2/2001 should be correlated with those of Article10 paragraph (2) of the same normative act according to which the cumulation of the fines applied for each contravention is limited by the double of the maximum for the most serious contravention of the committed ones (Podaru, Chiriță and Păsculeț, 2017, p. 302).

As regards the calculation of the period within which the fine must be paid, Article 28 paragraph (1) from G.O. no. 2/2001 stipulates that "fixed time limits start to run from midnight onwards, and the term ending on a public holiday or when the service is suspended will be extended until the end of the first working day thereafter."

In accordance with Article 37 from G.O. no. 2/2001, the report not filed within 15 days from the date of handing over or, as the case may be, of the notification, as well as the final court decision, by which the contraventional complaint has been settled, shall be *enforceable* without any other formality.

The sanction of the civil fine is enforced by the body from which the finding agent is part, if no contraventional complaint has been filed, or by the court, if this remedy has been exercised and the complaint has been rejected. In both situations the competent bodies are obliged to communicate the report of the finding of the contravention and of enforcement of the sanction and, respectively, the court decision to the specialized bodies within the central or local administration.

In accordance with Article 39 paragraph (2) from G.O. no. 2/2001, the deadline for communication shall be 30 days from the date of expiry of the legal term for challenging the report or from the date of the final decision of the following specialized bodies:

a) *the specialized bodies of the territorial-administrative units* in the territorial jurisdiction of which the offender natural person is domiciled or, where appropriate, the offender legal entity has its tax domicile, for the amounts which are turned into revenues to the local budgets;

b) *the specialized bodies of the units subordinated to the Ministry of Public Finance - the National Agency for Fiscal Administration*, in the territorial jurisdiction of which the offender legal person has its tax domicile, for the amounts that are fully turned into revenue to the state budget.

The execution of the civil fines is performed under the conditions stipulated by the legal provisions regarding the forced enforcement of the tax receivables. Against the acts of execution an appeal to execution can be made according to the law (Cătană, 2017, p. 431).

4. CONCLUSIONS

The analysis of the general normative framework on the legal regime of contraventions as well as the administrative and judicial practice in the field allowed the doctrinal conception of critical opinions and proposals of *lex ferenda*. A first observation is the one regarding the amount of the civil fines, with the highlighting of the general tendency of the contraventional lawmaker to increase excessively the maximum limits of the fines in certain areas. Although criminal fines are heavier than civil ones, primarily by their significance and less by amount, the possibility of imposing civil fines in a higher amount than that of criminal fines proves the neglect of the particularities of the offense. The need for more severe contraventional sanctions to be applied in certain situation may be met by acknowledging the relapse in the general regime of contravention.

As regards the destination of the amounts received as a fine, the doctrine also raised the question of the lawfulness of the collection by a public service concessionaire of the fines and of the percentage of the fine retained by the service provider. The issue is important given that the current framework law on contravention stipulates that the amounts resulting from the fines imposed on legal or natural persons are turned into integral revenue to the state budget or local budgets.

References

1) Alexandru, I., Cărăuşan, M. and Bucur, S. (2009). *Drept administrativ (Administrative Law)*. Bucharest: Universul Juridic Publishing House.
2) Apostol Tofan, D. (2015). *Drept administrativ (Administrative Law)* volume II, Bucharest: C.H. Beck Publishing House.
3) Cătană, E.L. (2017). *Drept administrativ (Administrative Law)*. Bucharest: C.H. Beck Publishing House.
4) Dinescu, A.-G. (2016). *Legislaţia contravenţiilor. Comentarii, doctrină şi jurisprudenţă (Contravention law. Comments, doctrine and jurisprudence).* Bucharest: Hamangiu Publishing House.
5) Hotca, M.A. (2012). *Regimul juridic al contravenţiilor, Comentarii şi explicaţii. (Legal Status of Contraventions, Comments and Explanations).* Bucharest: C.H. Beck Publishing House.
6) Mihăilescu, M.-E. (2013). *Sancţiunile contravenţionale, Aspecte de drept material în dreptul românesc şi comparat (Contraventional sanctions, Aspects of material law in Romanian and compared law).* Bucharest: Hamangiu Publishing House.
7) Pap, A. (2017). *Ordonanţa Guvernului nr. 2/2001 privind regimul juridic al contravenţiilor, Adnotată cu jurisprudenţă (Government Ordinance no. 2/2001 on*

the legal regime of contraventions, Annotated by jurisprudence). Bucharest: Universul Juridic Publishing House.

8) Petrescu, R.N. (2009). *Drept administrative (Administrative Law).* Bucharest: Hamangiu Publishing House.
9) Podaru, O., Chiriță, R. and Păsculeț, I. (2017). *Regimul juridic al contravențiilor. O.G. nr. 2/2001 comentată (The legal regime of contraventions. G.O. no. 2/2001 commented).* Bucharest: Hamangiu Publishing House.
10) Săraru, C.-S. (2016). *Drept administrativ, Probleme fundamentale ale dreptului public* (*Administrative Law, Fundamental Issues of Public Law).* Bucharest: C.H. Beck Publishing House.
11) Trăilescu, A. (2008). *Drept administrativ* (*Administrative Law).* Bucharest: C.H. Beck Publishing House.
12) Vedinaș, V. (2015). *Drept administrativ* (Administrative Law). Bucharest: Universul Juridic Publishing House.

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FUNDAMENTAL PRINCIPLES OF PUBLIC ACQUISITIONS AND THEIR LIMITS

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Abstract
The work with the title Fundamental principles of public acquisitions and their limits largely deals with one of the most important and complex problems regarding the public acquisitions regulation procedure and the development frame in the EU as well as in Romania.
These fundamental principles underline the leading ways in public acquisitions work, so that they don't generate distortions of the free concurrence on European free markets, taking into account the fact that, the direct experiences of the European Commission and of the member states governments, as well as the practice of the European Court of Justice indicate it as one of the most outstanding challenges of the moment.
The lack of respect of these fundamental principles led to the creation of an European judicial practice but also to the adjustment of the European and national legislation in this matter, and here is the reason why I undertook a synthetic analysis of the main regulations and of the jurisprudence of the European Court of Justice, study that led to a series of conclusions. The whole analysis makes us appreciate that this subject is an open one and it can lead towards new evolutions that might be embodied in other European or national regulations in this matter.
The formulation of these fundamental principles in the European legislation is the result of some continuous research, but the present analysis also underlines the Romanian experience in the matter of the public acquisitions, thus, the conclusions imposed should lead to an enrichment of the administrative activity and to the efficiency of the public money use.
Keywords: *public acquisitions; fundamental principles; sanctions to apply; judicial practice.*
JEL Classification: K23

1. INTRODUCTORY CONSIDERATIONS CONCERNING PUBLIC ACQUISITIONS

The public acquisition problem was the concern of the contemporary society at the highest level because through them two fundamental functions of the modern state are accomplished, respectively the efficient use of the public funds as well as the acquisition of goods and services meant to assure the

functioning of the state, generally speaking, as well as of all the categories of public systems, concretely.

In order to accomplish the two functions in conditions of maximum efficiency it was considered necessary a strict and detailed regulation of the public acquisitions, no public body being able to deal easily with the effects of the public acquisitions at macro or micro economic level.

The present study intends to treat bivalent the problems referring to public acquisitions, respectively at European level with example reference at the practice of the Court of Justice of the European Union but also at national level appreciating as useful the analysis of the Romanian experience and the conclusions we may reach, as a result.

The notion of public acquisition should be interpreted, ***in a wide sense***, as the activity regulated expressively and in detail through which an acquiring juridical person, with definitive or temporary title, obtains from public funds goods and/or services from the persons who offer them in the best conditions of price and quality. Contracting public acquisitions is done, on one side, between an acquiring juridical person (state organ and public institutions) and, on the other side, by any physical or juridical person, partner of the acquiring juridical person, who adjudged in auction the contract's settlement, its price being supported from public funds (approved by the EU, the state budget, the local budgets or other public sources).

The public acquisitions, thus, represent an ensemble of papers and actions that are compulsory in order to get, with payment, goods, services or works paid with public money. The aspects concerning the subjects obliged to apply the special procedures, the procedure's application instruments as well as its phases are thoroughly regulated by the Romanian law but having as a base the European legislation in the matter. In order to diminish possible fraudulent loss of public money and to assure correct and equal conditions of manifestation of the request - offer relation, the European and national legislator settled strict procedures for public acquisitions of goods, services or works.

Thus, the simple financing of an activity (especially through grants, often connected to the obligation of refunding the sums of money if they are not used in the purpose they have been meant to) is not, usually, settled by the public acquisitions norms. Similarly, the situations when all the operators fulfilling certain requirements are authorized for a certain task, with no selectivity, as for the systems that give the consumers the possibility to chose or the systems of services on coupons, shouldn't be understood as systems of public acquisitions but simply systems of authorization (for instance, licenses for medication or medical services) (Rațiu, 2017, p. 17).

In the European legislation it was shown that the assigning of the contracts for public acquisitions by or on behalf of the authorities of the member states should be in the respect of the Treaty concerning the European Union

functioning (TEUF), more precisely the free circulation of goods, the liberty to settle and supply services, as well as the principles they involve, as equal treatment, lack of discrimination, mutual acknowledgment, proportionality and transparency. However, for the contracts of public acquisitions over a certain value dispositions should be settled in order to coordinate the procedures of national public acquisitions, so that those principles are put into practice and the public acquisitions are open to free and correct concurrence.

In a more technical approach, the Romanian legislator *defines the public acquisition* as an acquisition of works, products or services through a contract of public acquisition by one or many contracting authorities from economic operators designed by them, no matter if the works, products or services are designed or not to the accomplishment of a public interest [1].

The legislator also defines a series of notions complementary to the one of public acquisition, such as:

- ***centralized activities of acquisitions*** - activities carried on by a unit of acquisitions permanently centralized through an acquisition of products on its behalf and/or services meant to a/many contracting authority/ authorities, or through crediting with contracts of public acquisition or settling framework-agreement for works, products or services on behalf and for another/other contracting authority/authorities [2];
- ***auxiliary activities of acquisition*** - activities that offer assistance and support for acquisition activities, especially technique infra-structure that allows the contracting authorities the assignment of public acquisition contracts or the settlement of framework-agreements for works, products or services, or assistance and advice [3].

2. JURIDICAL SOURCES IN PUBLIC ACQUISITIONS SUBJECT

The main ***European norms*** the present national legislation in public acquisitions is based on, are:

- Regulation (EU, Euratom) no.966/2012 of the European Parliament and of the Council, from 25 October 2012, concerning the financial norms that apply to the general budget of the Union and repealing of the Regulation (EC, Euratom) no.1605/2002 of the Council;
- European Parliament and Council's Directive 2014/24/EC concerning public acquisitions;
- European Parliament and Council's Directive 2014/23/EC concerning concession contracts assigning;
- European Parliament and Council's Directive 2014/25/EC concerning acquisitions made by entities developing their activity in the sectors of the water, energy, transportation or mail services;
- Regulation (EC) no.2195/2002 of the European Parliament and Council concerning the mutual Vocabulary concerning public acquisitions (CPV).

- Decision no. 2008/963/EC of the European Commission concerning the contracting authorities from Romania.

National legislation in public acquisitions is, mainly, based on the:

- Law no.98/2016 concerning public acquisitions;
- Law no.99/2016 concerning sector acquisitions;
- Law no.100/2016 concerning work concessions and services concessions;
- Law no.101/2016 concerning the remedies and ways of attack in assigning the contracts of public acquisitions, the sector contracts and the contracts of works concession and services concession, as well as for the organization and functioning of the National Council of Contestations Solving;
- EGO (Emergency Government Ordinance) no. 13/2015 concerning the foundation, organization and functioning of the National Agency for Public Acquisitions;
- EGO (Emergency Government Ordinance) no.98/2017 from 14 December 2017 concerning the *ex ante* control function of the process of assigning public acquisition contracts / framework-agreements, sector contracts / framework-agreements and contracts of work and services concession;
- EGO (Emergency Government Ordinance) no. 13 from 20 May 2015 concerning the foundation, organization and functioning of the National Agency for Public Acquisitions;
- GD (Government Decision) no. 634/2015 concerning the organization and functioning of the National Agency for Public Acquisitions.

3. FUNDAMENTAL PRINCIPLES OF PUBLIC ACQUISITIONS ACCOMPLISHMENTS. INTRODUCTORY CONSIDERATIONS

The regulation of the public acquisitions at European level is found on two levels. Thus, we are speaking, on one side, about public acquisitions done by European institutions in specific activities they develop and where is spent European public money collected at the level of the European Union Budget [4], and on the other side we are speaking about the compulsory European legislation for the member states of the European Union but referring to the way the public acquisitions are developed at national level in order to spend the public money gathered at the level of each state's public funds.

Thus, the Financial Regulation of the European Union has norms for the accomplishment of the public acquisitions from European funds [5]. According to that, all public acquisitions contracts, totally or partially financed from the budget, should respect ***the principle of transparency, proportionality, equality of treatment and non-discrimination.***

Although it doesn't define these principles, the Financial regulation of the European union has a series of regulations that allow the understanding and

interpretation of the sense and purpose of their evoking as rules that are at the bottom of the way the public acquisitions are concretely done at the level of the European Union.

According to the Romanian law [6], ***the principles*** on which the acquisition contracts are assigned and based on which the solution competitions are organized, are:

a) non - discrimination;
b) equal treatment;
c) mutual recognition;
d) transparency;
e) proportionality;
f) to assume responsibility

Thus, the contracting authorities are forbidden to conceive or structure the acquisitions or their elements in order to favour or disadvantage unreasonably some economical operators. Such practises are called *competition artificial restriction* [7].

The main technical instrument on which public acquisitions are based on in a transparent, equal and simultaneous way for all the interested economic operators is ***the electronic system of public acquisitions (SEAP).*** Thus, through this collocation is designed the informatics system of public utility, accessible through internet at a dedicated address, used in order to apply through electronic means the procedures of assigning and to publish the notifications at national level [8].

3.1 The principle of the transparency

The principle of transparency refers to the necessity that all the economic operators interested in taking part in a public acquisition could do it freely and willingly. A first condition refers to the free access to useful information in order to participate, with equal chances, at the development of the procedure of a public acquisition assigning.

So, the Financial Regulation of the European Union obliges the EU contracting authorities to publish in the Official Journal of the European Union all the contracts over passing the value levels established by the same regulation [9].

Also, the participation notices should be published in advance, with very few exceptions from the rule, 12 and the publication of some information after the contract has been assigned can be omitted only if this would stop the application of the law, would impede the public interest, would prejudice the legitimate business interests of the public or private enterprises or would misstate the loyal concurrence between them.

The contracts whose values are under the value levels established through the EU Financial Regulation 13 will also be the object of an adequate publicity.

According to the Romanian legislation, any communication, solicitation, information, notification and other things of the kind are sent in writing, through electronic communication means or, exceptionally, through other means than the electronic ones.

The instruments and devices used in the communication through electronic means as well as their technique characteristics should lack discrimination, should be at anyone's disposal, with general character, should assure the inter-operability with the products in general use in the field of the information and communication technology and should not limit the access of the economic operators to the operation of assigning.

Through ***exception*** from the rule mentioned above, ***the verbal communication*** can be used for other communications than the ones regarding the essential elements of an assigning procedure [10], conditioned by the writing of the main elements of the verbal communication contents as well as in the respect of the assigning procedures concerning the information of all the participants at an assigning procedure.

The contents of the verbal communication with the offerers that could have a significant impact on the contents and the evaluation of the offers are written down through corresponding means, as the minutes, the audio recordings or synthesis of the main elements of the communication [11].

A limitation of the transparency principle is represented by ***confidentiality*** that should be assured during the public acquisition process, respectively the guarantee of that the offerer's commercial secret and right to intellectual property are protected. The effects got through the setting up of this rule of confidentiality refer to the avoidance of un-loyal concurrence acts through leaking economic and technique information, as well as the avoidance to impose abusive solicitations.

At European level, article 21 from the Directive 2014/24EC regulates the aspects concerning ***the confidentiality of information*** used in public acquisitions. Thus, the contracting authority is obliged not to reveal the information sent by the economic operators and designed by them as confidential, inclusively (without limiting to them), the technique or commercial secrets and the confidential aspects of the offerers. The contracting authorities can impose to the economic operators requests that are to protect the confidentiality of the information the contracting authorities offer during the whole acquisition procedure.

The contents of the participation offers and solicitations, as well as the one of the plans/projects in the case of competition of solutions, is confidential until the date established for their opening [12].

Thus, in order to protect the confidential character of the information offered during the whole procedure of assigning, the contracting authority can impose some requests to the economic operators [13].

The contracting authority is allowed, if necessary, to impose the use of some ***instruments and devices that are not generally at hand,*** if it offers

alternative means to access them. It is considered that the contracting authority offered the adequate alternative means of access if it is in one of the ***situations:***

a) it offers direct, free, full and costless access, through electronic means, to the instruments and devices that are not costless accessible, since the date the participation advertisement was published. In this participation advertisement is specified the internet address where these special instruments and devices are accessible;

b) it assures that the economic operators who have neither access to the special instruments and devices nor the possibility to get them in the settled terms (if the lack of access can't be attributed to the economic operator in case) can access the assigning procedure using some online temporary devices put at their disposal costless;

c) it assures the availability of an alternative method in order to register the offers electronically.

In supporting these regulations, but detailing and explaining how they should be understood and interpreted, the Court of Justice of the European Union created an entire ***judicial practice,*** ample and complex, that is worth being given a special attention.

Thus, in the CJUE Decision from 16 April 2015 (Chamber 5) that has as object a preliminary decision asked for by an instance from Romania during a litigation between the Emergency Hospital Alba Iulia as contracting authority and SC Enterprise Focused Solutions SRL, as offerer, reference is made to ground (2) of the Directive 2004/18/EC of the European Parliament and of the Council from 31 March 2004 concerning the coordination of the procedures of assigning work, goods and services public acquisitions contracts, as it was modified through the Regulation (EU) no. 1251/2011 of the Commission from 30 November 2011, where it is shown that "the assigning of the contracts drawn in the member states on behalf of the state, of the territorial community and of other organisms of public law, should respect the principle provided by the treaty (TEUF) mainly the principle of goods free circulation, the principle of freedom of settlement and the principle of freedom in offering services, as well as the principles following these ones, as equality of treatment, lack of discrimination, mutual acknowledgment, proportionality and transparency. However, in terms of the public acquisitions contract over a certain value, it is recommended to elaborate some community coordination dispositions for the intern procedures used in assigning contracts founded on these principles, in order to guarantee their effects and to assure a concurrence environment for the public acquisitions. As a result, these coordination dispositions should be interpreted according to the previously mentioned norms and principles and according to the other norms mentioned in the treaty".

Thus, in the grounds of the decision it is also shown that *the technical specifications* should allow the equal access of the offerers and have as a result

some imposed unjustified obstacles for the concurrence concerning the launching of the public acquisitions procedures.

As for the principles of equality of treatment and lack of discrimination as well as the obligation of transparency, it is shown in the indicated decision that the members states should be recognized a certain margin of appreciation in order to adopt some measures meant to guarantee the respect of these principles, compulsory for the contracting authorities in any procedure of assigning a public acquisition contract (see decision Serrantoni and Consorzio stabile edili, C-376/08, EU:C:2009:808, points 31 and 32) The obligation of transparency has as a purpose especially to guarantee that the risk of arbitrary from the contracting authorities is removed (see, concerning art.2 from Directive 2004/18, Decision SAG ELV Slovensko and others, C-599/10, EU:C:2012:191, point 25, as well as the cited jurisprudence). Or, this objective shouldn't be reached if the contracting authority could depart from the conditions it settled itself. So, it is forbidden to change the assigning criteria during the assigning procedure. The principles of equality of treatment and lack of discrimination as well as the obligation of transparency have, in this sense, the same effect regarding the technical specifications.

Therefore, the principle of equality of treatment and the obligation of transparency forbid the contracting authority to reject an offer that fulfils the requests stipulated in the offer application based on some reasons that haven't been stipulated in the offer request already mentioned (Medipac - Kazantzidis Decision, C-6/05, EU:C:2007:337, point 54).

As a consequence, the contracting authority can't resort, after having published a participation advertisement, to a modification of the technical specification referring to an element of a contract, infringing the principles of equality of treatment and non-discrimination, as well as of the obligation to transparency. In this regard it is not relevant if the element this specification refers to still is or isn't any longer in fabrication or available on market.

3.2 The principle of treatment equality and non-discrimination

The principle of treatment equality and non-discrimination refers to a non-discriminatory application of the criteria of selection and those of assigning the public acquisition contract, so that any products provider, works executor or services provider has equal chances in the competition for that contract assigning.

The Directive 2014/24/EC and of the Council concerning public acquisitions also establishes, as a task of the contracting authorities, ***the obligation to treat the economic operators equally and non-discriminatory and to act in a transparent and proportional manner.*** In this regard it is underlined that the public acquisitions can't be carried on with the intention to exclude from that procedure any economic operator with the consequence of artificially diminishing the concurrence. The concurrence is considered to be artificially

diminished if the acquisition is done in order to unreasonably favour or disadvantage some economic operators.

In this regard the member states are obliged to adopt all the adequate measures in order to make sure that, in the public acquisitions execution, the economic operators respect the obligations they have in environmental, social and work field, obligations set up by the law of the Union, through the national law, through collective agreements or through international law dispositions in the environment, social and work field.

In the sense of the facts shown above, in the Decision of the EU Court of Justice (Chamber 8) from 11 May 2017 having as object a solicitation of preliminary decision formulated by Krajowa Izba Odwolawcza - Poland, it is shown that the principle of equality of treatment of the economic operators, stated in article 10 of the Directive 2004/17/EC of the European Parliament and of the Council from 31 Mars 2004 , of coordination of procedures in assigning contracts of acquisitions in the field of the water, energy, transportation and mail services, should be interpreted that it is forbidden that in a procedure of assigning a public acquisition contract the contracting authority asks an offerer to give declarations and documents whose communication was imposed by the specification book and that hadn't been communicated in the term established for the offers' registration. For a change, this article doesn't oppose the idea that the contracting authority asks an offerer for the clarification of an offer or for the regulation of an obvious material error it might have, but only if such a solicitation is addressed to any offerer in this situation, so that all offerers are equally and loyally treated and so that this clarification or regulation is assimilated with the registration of a new offer.

Another interesting decision is the Decision of the Court (Chamber 6) from 8 February 2018 having as object a solicitation of preliminary decision formulated by the Administrative - Regional Law Courts Calabria - Italy. There it is shown that the principles of transparency, equality of treatment and non-discrimination coming from the articles 49 and 56 TFUE and that are mentioned in article 2 of the Directive 2004/18/EC of the European Parliament and the Council from 31 March 2004 concerning the coordination of the assigning procedures of works, goods and services should be interpreted in the sense that they don't oppose any regulation of a member state as the one from the main litigation, that doesn't allow to eliminate two "unions" of Lloyd's of London from the participation in the same contract of public acquisitions of insurance services, for the simple fact that each of their offers have been signed by Lloyd's of London general representative, but allows, for a change, their exclusion if it comes out, based on some undoubting elements, that their offers have been formulated independently.

An application of the principle *the equal treatment is rediscovered in* the situation when, with the occasion of a new assigning procedure, the contractor

having executed till then the service or the work or having provided the product, is also participating. It is obvious that this one has more information than other possible competitors regarding the strategies, the plans of the contracting authorities, the way of work, the financial situation and so on. Some of this information is at least sensible if not even confidential. It can, obviously, influence the result of the new procedure disfavouring other competitors. The contracting authority is in the situation to get sure that all the competitors are equally treated, thus, it has a difficult and delicate mission from this point of view, making sure that it does not create, through the way the auction is organized, a competitive advantage for one of the competitors.

3.3 The principle of proportionality

The principle of proportionality refers to the necessity to assure a balance between the request for qualification, the assigning criterion for public acquisition contracts and the nature or the degree of complexity of the contract's object.

In the same time, the European legislator sets the fact that all the public acquisitions contracts are the object of an offering procedure with wide participation, exception being the situation when it is resorted to a negotiated procedure. So, it is shown that the contracting authorities can't use framework-contracts abusively or so that, through their purpose or effect, they lead to impede, restraint or denaturize the concurrence.

The Decision of the Court (Chamber 6) from 2 June 2016, having as object a solicitation for a preliminary decision formulated based on article 267 TEUF of the Council of Administrative Justice of the Region Sicily, Italy, sets the fact that the principle of equality of treatment and the obligation of transparency should be interpreted in the sense that they oppose the exclusion of an economic operator from the procedure of assigning a public acquisitions contract for the fact that this one does not respect an obligation that is not obviously expressed in the documents of such a procedure or in the national law in force but it may be just an interpretation of that law and those documents. In such situations, the principles of equality of treatment and proportionality should be interpreted in the sense that they don't oppose to allow the economic operator a remedy of situation (some deficiencies) and to fulfil the obligation mentioned in a term established by the contracting authority.

4. OTHER PRINCIPLES GOVERNING THE PUBLIC ACQUISITIONS

If the principles of the transparency, proportionality of equal treatment and non-discrimination are evoked in the European legislation also and we have already referred to them, ***the principle of the mutual acknowledgement and the principle to assume responsibility*** appear, as a novelty, in the Romanian legislation regarding the public acquisitions.

Although for many products and services that are freely circulating on the unique market there are already harmonised standards at EU level, in other domains pure national standards and requests are still applied. For these situations it is important ***the principle of the mutual acknowledgement*** of products legally manufactured in a member state and that should be accepted for marketing in the other member states also. In the same time, the services legally offered on the territory of a member state can be also offered on the territory of another member state.

The principle to assume responsibility is a clear determination of tasks and responsibilities of persons involved in the process of public acquisition and bears the juridical consequences for all the taken decisions or the actions done by all the persons involved in the process of public acquisition.

Although it is not expressively advised, ***the principle of the free concurrence*** *is* the vault key of the whole system of public acquisitions organized at European level. It is indirectly mentioned and represents the reason why the correct and fair balance between the subjects interested to participate in public acquisitions is looked for, without generating distortions that may affect the economic relations specific for a free market. More exactly, it is about to assure the conditions for any produces provider, works performer or services provider, no matter the nationality, to have the right to become, in the letter of the law, contractor. The results that are aimed at when evoking this principle refer to the creation of a competition frame in order to get the best results from the market and to forbid the discrimination of the potential participants to a procedure of public acquisitions on nationality criteria or any other reasons.

Anyway, the doctrine also evoked a fundamental principle of the public acquisitions not expressively regulated but deriving from the ensemble of national and European regulations as a desideratum of the organization of the acquisitions public system. We are talking about **the principle of an efficient use of public funds,** respectively the application, in the concurrence system, of the economic criteria in order to assign the contract of public acquisition. The effects followed when evoking this principle refer to getting a high revaluation of the public funds, always considered as insufficient when compared to necessities, and the surveillance of the costs of the public acquisition process, namely the costs bore by the contracting authority of the administration as well as the costs bore by the offerer.

5. INDIRECT APPLICATIONS OF THE PUBLIC ACQUISITIONS FUNDAMENTAL PRINCIPLES

5.1 Regarding the contracting authorities

Based on the Directive 2014/24/EC of the European Parliament and Council concerning the public acquisitions, through the notion of ***contracting***

authority is designed the state, the regional or local authorities, the public law organisms or the associations formed from one or many authorities or from one or many public law organisms.

By public law organisms is understood the organisms that cumulatively fulfil the following conditions:

- they are specifically founded to answer general interest necessities, with no industrial or commercial character;
- they have juridical personality;
- they are mostly financed by the state, by regional or local authorities or by other public law organisms, or their administration is the object of the respective organisms and authorities surveillance, or they have an administration, leading or surveillance council formed by members over 50% appointed by the state, by the regional or local authorities or by other public law organisms.

5.2 Regarding the economic operators

Based on the Directive 2014/24/EC of the European Parliament and Council concerning the public acquisitions, through the notion of ***economic contractor*** is understood any physical or juridical person or a public entity or a group of such persons and/or entities, including any kind of temporary association of enterprises offering works execution, products supply or market services carrying out.

It was proceeded, in the same time, to the definition of the notion of ***offerer*** as the economic operator who registered an offer for a public acquisition.

Not last, it was also defined the notion of ***candidate*** as the economic operator who asked for a participation invitation or was invited to participate to a limited procedure of public acquisitions, to a competitive procedure of negotiation, to a procedure of negotiation without a beforehand announcement, to a competitive dialogue or to an innovation partnership.

The economic operators who, based on the legislation of the member state they live in, have the right to carry out the in case service, can't be rejected only because, based on the legislation of the member state assigning the contract, they should be physical or juridical persons.

However, for the public acquisitions contracts of services and works, as well as for the public acquisitions contracts of goods supplementary involving services or works of location and installation, the juridical persons might be obliged to indicate, in their offers or requests for participation, the name and the relevant professional qualifications of the persons responsible for the execution of the contract in cause.

According to the European legislation, ***the groups of economic operators,*** including the temporary associations, can take part in procedures of acquisitions.

The contracting authorities can't impose them to have a specific juridical form in order to register an offer or a participation application.

As the situation imposes, the contracting authorities can clarify in the acquisition's documents how the groups of economic operators should fulfil the requests concerning the economic and financial situation or the technical and professional skills mentioned in article 58, in condition that this is justified through objective reasons and in the respect of the principle of proportionality. The member states can settle standard terms for the way the groups of economic operators are to fulfil those requests.

Any condition for a contract to be carried out by such groups of economic operators, different from the ones imposed to individual participants, are, also, justified by objective reasons and respect the principle of proportionality.

Nevertheless, the contracting authorities can impose the groups of economic operators to adopt a certain juridical form, once the contract has been assigned, if such a change is necessary for a satisfactory carrying out of the contract.

The Romanian legislation is totally in line with the European regulations concerning ***the juridical form*** that has to be respected by the economic operator interested in participating to a public acquisition [14]. However, some specifications are imposed.

Thus, when, for objective reasons, it is necessary and justified, the contracting authority is allowed to settle, through the assigning documentation, the way the economic operators are supposed to fulfil the requests concerning the economic and financial capacity as well as the technical and professional capacity, when it is a common participation to the assigning procedure, in the respect of the principle of proportionality.

In the same time, the contracting authority has the right to settle through the assigning documentation some specific conditions concerning the carrying out of the public acquisition contract or of the framework-agreement, when the economic operators take part together at the assigning procedure, different from the ones applied to individual offerers, justified by objective reasons and respecting the principle of proportionality.

In the situation of the public acquisitions contracts in services, of public acquisitions contracts in products including services or works or operations of location and installation, the contracting authority can oblige the juridical persons or other entities constituted in a form of organization stipulated by the legal dispositions to indicate, in the situation of the participation offers or solicitations, the name and revealing professional qualifications of the physical persons responsible for the execution of the contract in cause [15].

Thus, in the exemplification of the things shown above, we mention that the Decision of the European Court of Justice (Chamber 5) from 22 October 2015, pronounced in cause C-552/13, having as object an application of preliminary decision formulated based on the article 267 TFUE by the Law Court of

Administrative Disputed Claims nr.6 from Bilbao, Spain, it is shown that article 23 line (2) from the Directive 2004/18/EC of the European Parliament and the Council from 31 March 2004 concerning the procedures of assigning contracts of public acquisitions for works, goods and services opposes a requirement as the one in discussion in the main litigation, formulated as technical specification in the advertisements referring to contracts of public acquisitions that have as objects to provide health services, according to which the medical services being the object of the offer applications should be provided by private health facilities situated exclusively in a certain town, that is not compulsory to be the one where the patients benefiting of these services live, because this request automatically excludes the offerors who can't provide these services in such an institution of the town, but fulfil all the other conditions of these offer appliances.

As for the juridical form the offerers are asked for, we present the conclusions of the decision of the European Court of Justice (Chamber 5) from 28 January 2016 (cause C-50/14) having as object an application of preliminary decision formulated based on article 267 TEUF by the Regional Administrative Law Courts from Piemont, Italy that shows that articles 49 TEUF and 56 TEUF must be interpreted in the sense that they don't oppose a national regulation allowing the local authorities to give some sanitary transport services through direct assigning, lacking any kind of publicity, to some volunteering associations, if the legal and contractual frame their activity is carried out on contributes effectively to a social purpose as well as to the accomplishment of the solidarity and budget efficiency solidarity.

Another interesting situation is the one clarified by the Decision of the European Court of Justice (Great Chamber) from 24 May 2016 (cause C-396/14) having as object an application for preliminary decision formulated based on article 267 TEUF by Klagenaevnet for Udbud (The Commission for Contestations Solution in mater of Public Acquisitions, Denmark) that shows that the principle of equality of treatment of the economic operators that is in article 10 in the Directive 2004/17/EC of the European Parliament and the Council from 31 March 2004 to coordinate the assigning procedures in acquisition contracts in the sectors of water, energy, transportation and mail services corroborated with article 51 should be interpreted in the sense that a contracting entity is not against that principle when authorizing one of the two economic operators that have been part of a group of enterprises that has been invited as such to apply, to substitute the already mentioned group as a result of its dissolution and to take part in its own behalf to a negotiated procedure of assigning a public acquisition contract, if it is establish, on one hand, that this economic operator fulfils all the requests established by the mentioned entity, on the other hand, that its participation to the procedure doesn't deteriorate the concurrence situation with the other offerers.

Not last, we also consider important the Decision of the European Court of Justice (Chamber 5) from 18 December 2014 (cause C-568/13), having as object an application for preliminary decision formulated based on the article 267 TEUF by Consiglio di Stato (Italy), through which it is shown that article 1 letter (c) from the Directive 92/50/CEE of the Council regarding the coordination of the procedures for assigning public acquisitions contracts for services, opposes a national legislation that excludes the participation of a public health unit, as the one in discussion in the main litigation, to a procedure of assigning public acquisition contracts because of its quality of public economic organism, if this unit is authorized to operate on the market according to its institutional and statutory objectives. The Dispositions of the Directive 92/50 and especially the general principles concerning free concurrence, non-discrimination and proportionality, that are at the basis of this directive, must be interpreted in the sense that they don't oppose a national legislation that allows a public health unit to take part to a procedure of offer application and to register an offer with no concurrence, due to its public financing this unit benefits of. However when it analyzes ***the abnormally low character of an offer*** based on article 37 of this directive, the contracting authority can take into consideration the existence of a public financing that such a unit benefits of from the perspective of the possibility to reject this offer.

6. SANCTIONS APPLICABLE IN MATTER OF PUBLIC ACQUISITIONS

According the Financial Regulation of the European Union [16], the criteria of excluding the ones interested to participate to a procedure of public acquisitions are the following:

- they are in bankruptcy or the object of a liquidation or judicial administration procedure, signed judicial concordances, suspended their economic activity or are the object of a procedure as a result of these situations or are in similar situations after a similar procedure stipulated by the national legislation or regulations;
- they or the persons with power of representation, decision or control have been sentenced through a judicial decision with *res judicata* value of a competent authority of a member state for an offence connected to their professional conduct;
- they committed severe mistakes in their professional conduct, demonstrated through any means the contracting authority can justify, including BEI decisions or the ones of international organizations;
- they didn't respect the payment obligations of the social insurance contributions or taxes in accordance with the legal stipulations of the country they live in or of the contracting country, or of the country where the contract is done;

- they or the persons with power of representation, decision or control have been sentenced through a judicial decision with *res judicata* value for fraud, corruption, participation in a criminal organization, money laundry or participation at any other illegal activity in the prejudice of the EU financial interests.

Unlike these criteria, the Financial Regulation of the EU also contains criteria of exclusion applicable to assigning. 21. Thus, no contracts are assigned to candidates or offerers who, during the acquisition procedure due to the respective contract, find themselves in one of the following situations:

- they are in conflict of interests;
- they make themselves guilty of false declarations in the information asked for by the contracting authority, as a condition of participation at the acquisition procedure or didn't give that information;
- they are in one of the situations of exclusion from the procedure of acquisition mentioned in article 106 line (1) and to which we previously appealed.

If after the contract has been assigned the assigning procedure or the carrying out of the contract prove to be vitiated by substantial errors, by disorders or fraud, the contracting authority can refuse the finalization of the contract or can suspend its carrying out, if the case, cancel it, function of the phase the procedure is in.

If these errors, disorders or frauds are imputable to the contractor, the contracting authority can refuse the payments, also, or can retrieve the sums already paid, or can cancel all the contracts drawn with that contractor, proportionally with the seriousness of the error, disorder or fraud [17].

In order to protect itself efficiently from the economic operators that are in situations of exclusion and that will try to hide this reality, the Financial Regulation of the EU proceeded at the constitution of a ***data base regarding exclusions*** [18] that is administrated by the European Commission. It has details concerning the candidates and the offerers found in one of the situations mentioned in article 106, article 109 line (1) first paragraph letter (b) and article 109 line (2) letter (a).

In order to bring up to date the information from this data base, the authorities of the member states and of the third countries participating at the execution of the budget according to articles 58 and 61, communicate the competent credits accountant data concerning the candidates and the offerers found in one of the situations mentioned in article 106 line (1) first paragraph letter (e), when the conduct of that agent prejudiced the financial interests of the European Union. The credits accountant in cause gets this information and asks the accountant to put it in the data base. In the same time, these organisms have access to the information existing in this data base. BCE, BEI and the European Investment Fund have also access to the information contained by the data base

in order to protect their own funds. They can take into account or not this information or, as the case is, action on their behalf when assigning contracts according to their own norms in public acquisitions.

BCE, BEI and the European Investment Fund send the Commission information about the candidates and the offerers found in one of the situations mentioned in article 106 line (1) first paragraph letter (e), if those agents conduct prejudices the financial interests of the Union.

In these circumstances, the contracting authority can impose ***administrative and/or financial penalties:***

- to the contractors, candidates or offerers who are in the situations mentioned in article 107 line (1) letter (b);
- to the contractors if it was found that they seriously infringed the obligations they have based on the contracts financed by the state.

However, the contracting authority should offer, first and always, to that person the possibility to present his observations.

These penalties should be proportional with the importance of the contract and the seriousness of the infringement, and could be:

- the candidate or offerer's exclusion, or even the contractor's exclusion from contracts and grants financed from the budget, for a maximum 10 years period;
- the payment of a financial fine by the candidate, offerer or contractor, in the limit of the respective contract value.

In order to consolidate the protection of the Union's financial interests, the European institutions can decide, in the respect of the principle of proportionality, to publish the decisions of administrative and financial penalties, in condition that its application procedure is fully respected. The decision to publish the document of administrative and financial penalties application will take into account the seriousness of the infringement, including the impact on the Union's financial interests and image, the period that passed since the infringement was committed, its length and recurrence, the intention and degree of negligence manifested by the entity in cause, as well as the measures taken to remedy the situation.

The decision can be published only after all the legal ways of appeal against the penalty act have been consumed or after the prescription of the terms of appeal and will remain published on the internet site until the exclusion period expires or until six months passed since the payment of the financial penalty, if this is the only possible measure to be taken.

If physical persons are in such a situation, the publication decision is taken on account of the right to private life and respecting the rights stipulated in the Regulation (EC) no. 45/2001.

The Directive 2014/24/EC of the European Parliament and Council concerning the public acquisitions sets up a series of ***reasons of exclusion*** of an

economic operator from participating to a procedure of public acquisitions that operates when the contracting authorities establish, after having checked in accordance with articles 59, 60 and 61, or are acknowledged in any other way that the economic operator was the object of a conviction pronounced through a final decision, for one of the following facts [19]:

- participation in a criminal organization, in the sense of the article 2 from the Framework-Decision 2008/841/JAI of the Council;
- corruption, as it is defined by article 3 from the Convention regarding the fight against corruption that involves functionaries of the European Community or functionaries of the member states of the European Union and by article 2 line (1) from the Framework - Decision 2003/568/JAI of the Council, or as it is defined in the intern legislation of the contracting authority or of the economic operator;
- fraud, in the sense of article 1 from the Convention regarding the protection of the financial interests of the European Community;
- terrorist infringements or infringements connected to terrorist activities as they are defined in article 1, respectively article 3 from the Framework - Decision 2002/475/JAI of the Council or instigation, complicity or attempt to infringement, in the sense of article 4 of the framework-decision;
- article 1, respectively article 3 from the Framework-Decision 2002/475/JAI of the Council, or instigation, complicity or attempt to infringement, in the sense of article 4 of the framework-decision;
- money laundry or terrorism financing, as it is defined in article 1 from the Directive 2005/60/EC of the European Parliament and the Council;
- children work slavery and other forms of persons traffic, as it is defined in article 2 from the Directive 2011/36/EU of the European Parliament and the Council.

The obligation to eliminate an economic operator also applies if the person definitively sentenced is a member of the organism of administration, of leadership or of control of the respective economic operator or has the power of representation, decision or control.

Moreover, the contracting authorities can exclude or may be asked by the member states to exclude an economic operator from participation to a procedure of acquisition if the contracting authority can demonstrate by any adequate means that the economic operator violated the obligations concerning the payment of the taxes or of the contributions to social insurance, or this was settled through a judicial or administrative decision with definitive and compulsory character, according to the legal dispositions of the country this one lives in or the ones of the member state of the contracting authority. This rule is no longer applied if the economic operator fulfilled the obligations paying the taxes or the social insurance contributions or drawing an arrangement with compulsory

character in order to pay them, as well as, if the case, the possible accumulated interests or fines.

The member states are allowed, however, to derogations from the rule of compulsory exclusion, for imperative public interest reasons (as the public health or the protection of environment) but also if an exclusion would be obviously disproportioned, especially when only small sums remain unpaid from the taxes or the social insurance contributions or when the economic operator was informed about the exact sum owned after he violated the obligation connected to taxes or social insurance contributions payment, in a moment when he had no possibility to obey the directive's measures, before the term for asking participation expired or, in the situation of open procedures, of the term for registration of the offer.

Not last, the contracting authorities can exclude, or the member states can ask them to exclude from participation to a public acquisition procedure, any economic operator who is in one of the following situations [20]:

- if the contracting authority can demonstrate through any adequate means a violation of the applicable obligations mentioned in article 18 line (2);
- if the economic operator is in bankruptcy or in a situation of insolvency or liquidation, of judicial administration, of preventive bankrupt's certificate, of end of activity or any other similar situation resulting after an identical procedure mentioned in the legislation and in the national regulations;
- if the contracting authority can demonstrate through adequate means that the economic operator is guilty of a severe professional violation that questions his integrity;
- if the contracting authority has enough plausible clues to demonstrate that the economic operator signed with other economic operators agreements aiming at the concurrence's misrepresentation;
- if a conflict of interests in the sense of article 24 can't be effectively remedied through other measures less intrusive;
- if a misrepresentation of the concurrence due to a previous participation of the economic operators to the preparation of the acquisition procedure, as it is mentioned in article 41, can't be remedied through other measures less intrusive;
- if the economic operator proved significant or persistent deficiencies in fulfilling a fond request stipulated in a previous contract of public acquisition, in a previous contract signed with a contracting entity or in a previous concession contract that led to beforehand stop that previous contract, prejudices-interests or any other comparable penalties;
- if the economic operator is severely guilty of false declarations in offering the necessary information for the verification of the absence of reasons leading to exclusion or to the fulfilment of the criteria for

selection, or didn't divulge this information or is not able to present the justifying documents solicited in accordance with article 59;

- if the economic operator tried to influence in an unacceptable way the decisional process of the contracting authority, to get confidential information that might offer him undue advantages in the public acquisition procedure or to negligently offer false information that might have a significant influence on the decisions concerning the exclusion, the selection or the assigning.

However, the directive allows the member states to ask for or to regulate the possibility for a contracting authority not to exclude an economic operator found in one of the situations previously mentioned, when the contracting authority established that the economic operator in cause will be able to work out the contract, taking into account the applicable national norms and the measures concerning the activity's carrying out.

On the other hand, the contracting authorities are rightful to exclude, in any moment during the procedure, an economic operator if it is found that this one is, taking into account the committed or omitted facts, before or during the procedure, in one of the situations previously mentioned.

However, any economic operator found in one of the situations previously mentioned can offer proofs to show that the measures taken by the economic operator are insufficient to demonstrate his security in functioning, in spite of the fact that there is a relevant reason for exclusion. If such proofs are considered enough, the economic operator in cause is not excluded from the acquisition procedure. For this purpose, the economic operator proves that he has paid or promised to pay a compensation for possible prejudices caused through infringement or violation, that he has completely clarified the facts and the occurrences, actively cooperating with the authorities charged with the investigation and that he took concrete measures at technical, organisational and stuff level in order to prevent any new infringements or violations. The measures taken by the economic operators are evaluated taking into account the seriousness and the specific circumstances of the infringement or violation. If the measures are insufficient, the economic operator receives an explanation of the respective decision reasons.

Through a legislative or administrative national document and in the respect of the Union's right, the member states define the applying conditions of these rules. Through the national legislation it is established the maximum period for exclusion, if the economic operator takes no measures to demonstrate his security in functioning. If the period of exclusion was not established through definitive decision, the respective period can't be longer than five years since the date the sentence was pronounced through definitive decision, in the situations mentioned in line (1), and three years since the date of the relevant event, in the

situations stipulated in line (4) of article 57 from the Directive 2014/24/EC of the European Parliament and Council concerning public acquisitions.

Based on the above mentioned things we keep in mind the Decision of the European Court of Justice (Chamber 5) from 4 May 2017 (cause C-387/14) having as object an application for preliminary decision drawn based on article 267 TEUF by Krajowa Izba Odwoławcza (The National Chamber of Appeal, Poland) that shows that article 45 line (2) letter (g) from the Directive 2004/18, that allows the exclusion of an economic operator from participating to a public acquisition contract among others if he is "severely guilty" of false declarations, should be interpreted in the sense that it should be applied when the operator in cause was responsible of negligence of a certain severity, namely a negligence with a certain determinant influence on the decisions of exclusion, selection or assigning a contract of public acquisition, besides the finding of a certain on-purpose violation of this operator.

We, also, mention the Decision of the European Court of Justice (Chamber 10) from December 2014 (cause C-470/13) having as object an application for preliminary decision formulated based on article 267 TEUF and 56 TEUF by Fővárosi Közigazgatási és Munkaügyi Bíróság (Hungary), that shows that articles 49 TEUF and 56 TEUF don't oppose the application of a national regulation that excludes the participation to a procedure of offer application of an economic operator who violated the concurrence's right , found out through a judicial decision that got sentenced work authority and for which he also got fined.

Not last we invoke the Decision of the European Court of Justice (Chamber 10) from 22 October 2015 (cause C-425/14) having as object an application of preliminary decision formulated based on article 267 TEUF by Consiglio di Giustitia administrativa per la Regione Siciliana (the Administrative Council of Justice for the Region Sicily, Italy) through which it is shown that the fundamental norms and the general principles of the EUF Treaty, especially the principles of equality of treatment and non-discrimination, as well as the obligation of transparency this one involves, should be interpreted in the sense that they don't oppose a disposition of national law under which a contracting authority may foresee for a candidate or offerer to be automatically excluded from a procedure of offer application to a contract of public acquisitions for which he didn't register, with his offer, a written accepting of the pledges and declarations found in a legality convention whose object is to fight the infiltration of organized criminality in the sector of the public acquisitions. However, if this convention has declarations according to which the candidate or the offerer are not in a position of control or association with other candidates or offerers, didn't draw and won't draw an agreement with other participants to the procedure of offer application and won't subcontract any kind of obligations to other enterprises participating to the respective procedure, the lack of such

declaration can't have as direct consequence the automat exclusion of the candidate or of the offerer from the mentioned procedure.

The Romanian legislation took over a great part of the rules mentioned above, meant to assure the respect of the fundamental principles of the public acquisitions.

In the same time, other situations have been taken into account, that imposed to evoke the general rule [21] according to which the contracting authority has the obligation to take all the necessary measures to prevent, identify and remedy the situations of ***conflict of interest*** along the assigning procedure, in order to avoid the misrepresentation of the concurrence and to assure an equal treatment for all the economic operators.

We understand by ***conflict of interests*** any situation in which the members of the contracting authority staff or of one of the suppliers of acquisition services action on behalf of the contracting authority, who are involved in the going on of the assigning procedure or who can directly or indirectly influence its result, a financial, economic or any other personal interest that might be taken for an element that compromises their impartiality or independence in the context of the assigning procedure [22].

Situations potentially generating conflict of interests are any situations that might lead to a conflict of interests, as it is defined by the law, such as:

a) the participation in the process of verification or evaluation of the participation solicitations or offers of the persons with social parts, interest parts, actions from the subscribed capital of one of the offerers or candidates, third supporters or subcontractors or persons who are part in the administration council or in the leading or supervising organ of one of the offerers/candidates, third supporters or subcontractors;

b) the participation in the process of evaluation of the participation solicitations or of the offers of a person who is husband/wife, relative or in-law, up to the second degree included, with the persons who are part in the administration council or in the leading or supervising organ of one of the offerers/candidates, third supporters or subcontractors;

c) the participation in the process of verification or evaluation of the participation solicitations or offers coming from a person who is known with or about which there are reasonable signs or information that he might have, directly or indirectly, a personal, financial, economic or any other interest, or that he is in another situation that touches his independence and impartiality along the evaluation process;

d) the situation in which the offerer, the candidate, the subcontractor proposed or the third supporter has members inside the leading or supervising organ or shareholders or significant associates, persons who are husband/wife, relatives or in-laws, up to the second degree included, or who are in commercial relationship with persons having decisional functions in the contracting authority

or in the one of the acquisition services supplier involved in the assigning procedure;

e) the situation in which the offerer or the candidate nominated among the main persons designed for the execution of the contract, persons who are husband/wife, relatives or in-laws, up to the second degree included, or who are in commercial relationship with persons having decisional functions in the contracting authority or in the one of the acquisition services supplier involved in the assigning procedure [23].

By **significant shareholder or associate** should be understood the person exercising the rights of some actions that, cumulatively, represent at least 10% from the social capital or gives the holder at least 10% from the total of the rights of vote in the general assembly [24].

On the other hand, the offerer declared winner with whom the contracting authority signed a public acquisition contract ***has no right*** to assign or sign any other agreements regarding the assigning of services, directly or indirectly, in order to carry out the contract of public acquisition, with physical or juridical persons who have been implied in the legal procedure of public acquisitions carrying out [25] for a period of at least 12 months since the contract was signed, ***under the sanction of a lawfully resolution or cancelation of the respective contract*** [26].

From the procedural point of view, if the contracting authority identifies a situation potentially generating conflict of interests, it has the obligation to take any necessary steps to establish if that situation represents a situation of conflict of interests and to present the candidate or the offerer found in that situation the reasons that, in the opinion of the contracting authority, could bring a conflict of interests. In this situation, the contracting authority has to ask the candidate, respectively the offerer, for his point of view regarding that situation.

If after an evaluation of the situation also done based on the candidate (offerer) 's point of view, the contracting authority establishes that there is a conflict of interests, it has to adopt the measures considered necessary in order to eliminate the circumstances that generated the conflict of interests. Thus, it can dispose the replacement of the persons responsible for the evaluation of the offers, when their impartiality is affected, where possible, or the elimination of the offerer/candidate found in relationship with the persons with decision functions in the contracting authority [27].

In order to avoid the situations of conflict of interests, the contracting authority should underline in the documents of the acquisition the names of the persons with decision functions in the contracting authority or of the provider of acquisition services involved in the assigning procedure. So, the contracting authority has to publish, through electronic means, the name and identification data of the offerer/candidate/subcontractor proposed/third supporter, in maximum 5 days since the expiration of the limit-term for the registration of the

participation solicitations/offers, with the exception of the physical persons for which only the name is published [28].

7. CONCLUSIONS

As a conclusion, we can notice that, although the fundamental public acquisitions principles apparently know a European regulation relatively brief and very concise, in fact they have a special importance, generating a judicial practice especially complex and important. The contents of the present work is only about the decisions of the European Court of Justice, pronounced in the last years. In their sense many decisions have been pronounced by the national instances also, that can be important guide marks in outlining a jurisprudence in this matter. Even if the judicial practice doesn't represent a law source in the Romanian judicial system, its importance is proved to be very special for the unitary application of the public acquisitions legislation all over the national territory.

NOTES

[1] Acc.to art. 3, line (1), point b of the Law no. 98/2016 regarding public acquisitions.
[2] Acc.to art. 3, line (1), point e of the Law no. 98/2016 regarding public acquisitions.
[3] Acc.to art. 3, line (1), point d of the Law no. 98/2016 regarding public acquisitions.
[4] For additional explanations regarding the execution of the European Union Budget see Şaguna and Tofan (2010, p. 145 and the other).
[5] Art. 112, line (1) of the Regulation (EU, Euratom) no. 966/2012 of the European Parliament and the Council from 25 October 2012 regarding the financial norms applicable the general budget of the Union and the abrogation of the Regulation (EC, Euratom) no. 1605/2002 of the Council.
[6] Acc.to art. 2, line (2) of the Law no. 98/2016 regarding public acquisitions, with further modifications.
[7] Acc. to art. 50 of the Law no. 98/2016 regarding public acquisitions.
[8] Acc. to art. 3, line (1), point nn of the Law no. 98/2016 regarding public acquisitions.
[9] Stipulated by art. 118 or 190.
[10] The essential elements of the assigning procedure include the documents for acquisition, the solicitations for participation and the offers.
[11] Acc. to art. 64 of the Law no. 98/2016 regarding public acquisitions.
[12] Acc. to art. 65 of the Law no. 98/2016 regarding public acquisitions.
[13] Acc. to art. 57 of the Law no. 98/2016 regarding public acquisitions.
[14] Acc. to art. 53 of the Law no. 98/2016 regarding public acquisitions.
[15] Acc. to art. 52 of the Law no. 98/2016 regarding public acquisitions.
[16] Art. 106, line (1) of the Regulation (UE, Euratom) no. 966/2012 of the European Parliament and Council from 25 October 2012 concerning the financial norms applicable to the general budget of the Union and the abrogation of the Regulation (EC, Euratom) no. 1605/2002 of the Council.
[17] Art. 116, line (1) of the EU financial Regulation.
[18] Art. 108 of the EU financial Regulation.

[19] Art. 57, line (1) from the Directive 2014/24/EC of the European Parliament and thr Council regarding public acquisitions.
[20] Art. 57, line (4) from the Directive 2014/24/EC of the European Parliament and the Council regarding public acquisitions.
[21] Acc. to art. 58 of the Law no. 98/2016 regarding public acquisitions.
[22] Acc. to art. 59 of the Law no. 98/2016 regarding public acquisitions.
[23] Acc. to art. 60, line (1) of the Law no. 98/2016 regarding public acquisitions.
[24] Acc. to art. 60, line (2) of the Law no. 98/2016 regarding public acquisitions.
[25] Respectively in the process of verification and evaluation of the participation offers or solicitations registered in a procedure of assigning or employees or ex-employees of the contracting authority or of the provider of acquisition services involved in the assigning procedures stopped the contract relations that followed the assigning of the public acquisition contract.
[26] Acc. to art. 60, line (2) of the Law no. 98/2016 regarding public acquisitions.
[27] Acc. to art. 62 of the Law no. 98/2016 regarding public acquisitions.
[28] Acc.to art. 63, line (2) of the Law no. 98/2016 regarding public acquisitions.

References

1) Rațiu, M.A. (2017). *Dreptul achizițiilor publice*, vol. I. București: Universul Juridic.
2) Șaguna, D.D. and Tofan, M. (2010). *Drept financiar și fiscal european*. București: C.H.Beck.

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CORRUPTION AND PUBLIC SPENDING. EASTERN EUROPEAN COUNTRIES CASE STUDY

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Abstract
The effects of corruption on government spending are a serious debate; and fewer studies are on this subject in East Europe. This paper analyses these effects using an ARDL methodology for 3 Eastern European countries in the period 1995-2017. The results indicate that there is interaction between corruption and public spending, undermining the positive effects of last one.
Keywords: *corruption, public spending, ARDL model.*
JEL Classification: C22, D73, H50

1. INTRODUCTION

The way in which the interaction between government spending and corruption affects economic growth has been taken into account by few empirical studies. This study takes into account an endogenous growth model, analyzing 3 East European countries, and its results show that the interaction between corruption and public spending strongly influences the latter. The impact of corruption on public spending in three Eastern European countries: Bulgaria, Hungary and Romania is investigated in this paper, the period under review is 1995-2017. The reduction of differences between citizens is traditionally achieved through government intervention, our results indicating that corruption undermines the positive impact of public spending on economic growth.

In economic theory it appears that corruption especially improves economic activity only when the optimal level of the governmental size is exceeded by its real size, thus increasing the corruption (Acemoglu and Verdier, 1998; Farooq *et al.*, 2013; Del Monte and Papagni, 2001).

The influence of corruption on economic growth can be achieved in the following ways: first of all as an obstacle (Paksha Paul, 2010), reducing the desire to invest: "capable" companies, and not necessarily the best ones, could be better connected to central government and local resources (Egharevba and Chiazor, 2013); secondly, by distorting the composition of government spending (Ugur, 2014), because corrupt politicians should invest in large, unproductive projects, for which it is easier to get a big bribe (Paksha Paul, 2010).

This paper contributes to the literature by analyzing how corruption interacts with the various forms of government spending to influence economic growth. the work consists of 5 sections; Section 2 presents the main articles on the topic of analysis; Section 2, conceptually investigates the relationship between corruption and public spending; Section 3 describes the model and data used in the article; section 4 presents the empirical results of the analysis, and the last section represents concluding remarks.

2. LITERATURE REVIEW

The link between corruption and economic growth is not a new concept in the economy in recent years, attempting to explore the impact of corruption on economic growth, but there is no consensus among economists about the role of corruption (Asiedu and Freeman, 2009). Most empirical studies show that corruption is hampering economic growth (Oni and Awe, 2012), but the experience of coexistence of increased economic growth and corruption in developing countries questions the general nature of these studies (Ali, 2010).

The pioneering studies of Barro (1991) and Levine and Renelt (1992), using regressions for transversal estimates of corruption on average economic growth rates and a set of control variables, have generated similar approaches in most subsequent studies. The conclusions of these studies state that endemic and omnipresent corruption leads to lower economic growth, obstructing both private and productive government spending and inhibiting the efficiency of public services (see, for an analysis: Aidt, 2003; Svensson, 2005).

Although sometimes in certain circumstances and at certain times, corruption can also play a positive role in economic growth and investment: Rock and Bonnett (2004) have determined that corruption significantly promotes economic growth in China, Indonesia, Korea, Thailand and Japan.

However, the literature remains divided on the channels through which corruption is transmitted and the dimension of the direct and indirect impact of corruption on the rate of economic growth. Numerous studies show how corruption influences economic growth and public spending by inducing uncertainty in decision-making and ultimately increasing business costs (Ajie and Wokekoro, 2012). Specialist literature presents four ways in which corruption influences economic life: decreasing infrastructure quality; reducing public investment that reduces overall productivity and growth; lower spending on education and health due to declining public revenues (Tanzi and Davoodi, 1997); increasing the wealth of the wealthy on account of the decline in poor wealth (Gupta, Davoodi and Alonso-Terme, 1998).

Mauro (1995) found a significant negative relationship between corruption, investment and economic growth, and found that a fall in the corruption index led to an economic growth of 0.8%. Mo (2001) has analyzed the relationship between corruption and economic growth in 60 countries and has shown that

corruption has a reverse impact on economic growth through political instability, resulting in a fall in human capital and share of investment.

Shabbir and Anwar (2007) investigated the determinants of both economic and non-economic corruption at the level of 40 developing countries and concluded that economic factors (increased economic freedom, globalization and average income levels) are more important than non-economics (level of education).

Ali, Cullen and Gasbarro (2010) investigated the relationship between corruption and economic growth. They noted that higher corruption in industrialized countries leads to lower economic growth and no relationship between economic growth and corruption is found in non-Asian countries, but a positive relationship exists between both variables in Asian countries. Ali, Cullen and Gasbarro (2010) analyzed the relationship between corruption and economic growth and determined that higher corruption in industrialized countries leads to lower economic growth.

Ugur and Dasgupta (2011) analyzed the relationship between corruption and economic growth and established a negative link between corruption and economic growth in low-income and high-income countries. For low-income countries, the effects of corruption are negative: direct (-0.07%); indirectly (through public finance and human capital channels, -0.23% and -0.29% respectively); (-0.59%), which means that the 1% increase in the corruption index will decrease the economic growth by 0.59%. for high-income countries, the effect is even more pronounced -0.86%.

3. METHODOLOGY

The following mathematical model may illustrate the empirical tests regarding the existence of the correlations (Saha and Gounder, 2013):

$$Yt = f(\text{Expenditure, Corruption, N}) \quad (1)$$

where: Yt measures the real GDP real (GDP growth rate), Expenditure indicates the state intervention in economy, Corruption indicates the perceived corruption index, while N represents the existence of certain exogenous factors.

We considered the most adequate indicator for Q, the real GDP growth (expressed in %), while for the public spending (exp) as % of the GDP and the other factors have been dismissed. As a consequence, the model can be rewritten as the following non-linear regression (Phillips and Hansen, 1990):

$$\ln(Yt\ \text{Growth (GDP)}) = \alpha_1 + \alpha_2 \ln(\text{Exp}) + \alpha 3 \ln(\text{Corruption}) + \varepsilon_t \quad (2)$$

If the public spending coefficient (α_2) has a positive sign in this function, this has a positive impact on the GDP; likewise, if the coefficient of the square function of public spending ($\alpha 3$) is negative in the previous function then the negative consequences of an oversized state occur.

When some series are stationary at the level I(0), and some others are stationary at the first difference level I (1), the traditional cointegration Johansen test cannot be applied. This problem could be solved by using the ARDL model, developed by Pesaran, Shin and Smith (2001) through the observation of the long-term relationship between variables. The cointegration method used in this study, Autoregressive Lag Distributed (ARDL) allows testing the long-run relation between variables which have a different integration order. The model form taking into account the previous equations, can be written as:

$$d(\text{growth GDP}) = c+\alpha_1 d(\text{growthGDP}(-1))+\alpha_2 d(\text{Exp}(-1))+ +\alpha_3 d(\text{Corruption}(-1))+\alpha_4 \text{growthGDP}(-1)+\alpha_5 \text{Exp}(-1)+ \alpha_6 \text{Corruption}(-1) \quad (3)$$

In order to establish the accuracy of the ARDL model, diagnosis tests are performed (series correlation, normality and heteroscedasticity associated with the model) as well as stability tests (sum of cumulative residues and cumulative sum of recursive residual squares). For the cointegration relation in equation 6 we tested the methodology formulated by Perasan for the ARDL model: the null hypothesis of the cointegration non-existence will be rejected if the calculated F-statistics is higher than the superior threshold critical value; if the calculated F-statistics is lower than the inferior threshold critical value then we cannot reject the existence of cointegration; in case the calculated F-statistics is during the interval inferior-superior threshold, then the zero hypothesis is admitted, meaning that there is no cointegration between variables. In this study, the maximum lag length was 4 considering the semestrial data.

Taking into consideration that we analyze time series and that during 2008 the financial crisis hit the countries studied, one can assume that within the times series there are structural breaks. To identify them, we shall use Zivot-Andrews Unit Root Test. Zivot and Andrews (2002) offer calculus methods of the structural break in a time series at an unknown moment through the development of 3 models: model (A) allows for an exogenous change of the series level, enabling the level variation within the series level; model (B) allows an exogenous change of the growth rate through the level variation in the function slope while model (C) admits two modifications, combining changes of level and the trend function slope of the series. The three models are the following:

Model with Intercept (Model A)

$$y_t=\mu^A+\theta^A DU_t(\lambda)+\beta^A t+\alpha^A y_{t-1}+\Sigma_{j=1}^{k} c_j^A \Delta y_{t-1}+\varepsilon_t \quad (4)$$

Model with Trend (Model B)

$$y_t=\mu^B+ \beta^B t +\gamma^B DT_t(\lambda)+\beta^A t+\alpha^B y_{t-1}+\Sigma_{j=1}^{k} c_j^B \Delta y_{t-1}+\varepsilon_t \quad (5)$$

Model with Intercept and Trend (Model C)

$$y_t=\mu^C+\theta^C DU_t(\lambda)+\beta^C t+ \gamma^C DT_t(\lambda)+\alpha^C y_{t-1}+\Sigma_{j=1}^{k} c_j^C \Delta y_{t-1}+\varepsilon_t \quad (6)$$

where: $DU_t(\lambda)=1$ if $t>T\lambda$, 0 in the opposite case
$DT_t^*(\lambda)=t-T\lambda$ if $t>T\lambda$, 0 in the opposite case

If the minimum computational value of F-statistics for each model is higher than the critical value, the null hypothesis indicating the unit root without any structurally exogenous break will be rejected in favour of an alternative hypothesis which implies the stationary status of the series in the presence of a structural break during an unknown time period (Zivot and Andrews, 2002).

4. EMPIRICAL RESULTS

The data on economic growth and public expenditure has been obtained from IMF World Economic Outlook; on Corruption Perceptions Index (CPI) has been collected from the reports of Transparency International (2008-2018). Our study covers time series data over the period of 1998–2017.

Table 1 shows the descriptive statistics for the analyzed series. As we can see, all series are normally distributed. The average corruption index varies between 3.6 (Romania), 3.8 (Bulgaria) and 5.0 (Hungary), with minimum points for Romania (2.60) and maximum, Hungary (5.50). Bulgaria (34.89) and Romania (34.03) show values for the lower public spending indicator; Instead, Hungary is close to 50 (49.72). The minimum values are presented by Romania (30.72%), and the highest ones by Hungary (55.27). GDP average is lower for Bulgaria (4383.67) and Romania (5343.07) and double for Hungary (9619.37). However, in recent years, GDP discrepancies are shrinking, Bulgaria (7853.33) and Romania (10136.47) trying to reach Hungary (15739.74).

Table 1. Descriptive statistics

	Bulgaria			Hungary			Romania		
	COR	EXP	PIB	COR	EXP	PIB	COR	EXP	PIB
Mean	3.80	34.89	4383.67	5.00	49.72	9619.37	3.62	34.03	5343.07
Median	4.00	34.77	3893.69	5.10	49.53	11205.97	3.60	33.87	4676.31
Maximum	4.30	37.76	7853.33	5.50	55.27	15739.74	4.80	37.88	10136.47
Minimum	2.90	32.09	1148.49	4.12	47.16	4172.76	2.60	30.72	1323.10
Std. Dev.	0.39	1.55	2691.26	0.32	1.73	4158.58	0.68	1.88	3530.05
Skewness	-0.83	0.15	0.09	-0.80	1.23	-0.17	0.27	0.35	0.11
Kurtosis	2.62	2.26	1.25	3.49	5.75	1.34	1.89	2.65	1.22
Jarque-Bera	2.82	0.61	2.96	2.69	13.13	2.73	1.46	0.58	3.05
Probability	0.24	0.73	0.22	0.26	0.01	0.25	0.48	0.74	0.21
Sum	87.49	802.58	100824.4	115.06	1143.57	221245.5	83.28	782.75	122890.7
Sum Sq. Dev.	3.45	53.46	1.59E+08	2.35	65.98	3.80E+08	10.18	77.93	2.74E+08
Observations	23	23	23	23	23	23	23	23	23

Source: own calculations

We begin our analysis by identifying the structural breaks and using the Zivot-Andrews test for each of the three series, separately for each of the 3 countries. The test results are presented in Table 2. As it was expected and according to the economic phenomena, the point of structural breaks appear during 2008-2009 that is during the financial crisis; these break points are almost similar for all time series.

Table 2. Zivot-Andrews test statistics

Country	Series	Chosen break point	Zivot-Andrews test statistic t-Statistic	Prob. *
Bulgaria	COR	2008	-4.52	0.02
	EXP	2013	-3.44	0.00
	PIB	2012	-3.03	0.57
Hungary	EXP	2007	-3.76	0.14
	COR	2012	-5.23	0.00
	PIB	2008	-4.57	0.01
Romania	COR	2002	-4.62	0.19
	EXP	2007	-3.16	0.01
	PIB	2012	-4.47	0.16

Source: own calculations

To establish the long-term relationship to cointegration between variables, we will use the ARDL Limit Testing approach. Compared with traditional cointegration approaches where all series must be I (1), the ARDL limit co-integration test method requires that no variable is stationary at I (2), the order of integration of the series may be I (0) or I (1) or I (0) / I (1). If any series is stationary I (2), the ARDL limit testing procedure become invalid. Any root unit tests (such as ADF, PP, KPSS, and Ng-Perron) can be used to test the properties of the root of the variable unit. If a series presents a structural break, the tests listed above become inoperable.

Table 3 below shows the critical values of the Bounds test calculated by Pesaran, Shin and Smith (2001) and Narayan (2005); because the size of the sample is relatively small (n = 23), we decided to report the critical values of the Bounds test, which were specifically calculated for the small size of the Narayan (2005) samples.

The F calculated for Model A is for Bulgaria (11,862), Hungary (15,133) and Romania (8,179) respectively. The F value for model A is very high and above the critical values I (1) of the Pesaran and Narayan limits to a significance level of 1%. Therefore, it is concluded that the null hypothesis of lack of cointegration can be rejected in both cases.

In Table 3, the results of the border cointegration test demonstrate that the null hypothesis of its alternative is slightly rejected at the significance level of

1%. Statistical statistics F calculated at 11.862, 15.113 and 8.179 are higher than the lower critical threshold value of 3.74, indicating a long-term relationship between GDP, corruption and public spending.

Table 3. ARDL Bound tests

Country	Optimal lag length	F-statistics	Significant level	Lower bounds I(0)	Upper bounds I(1)	Series	Prob. *
Bulgaria	1, 2, 1	11.862	10%	2.63	3.35	COR	-0.111
			5%	3.1	3.87	PIB	-0.011
			1%	4.13	5.00	C	3.796
Hungary	2, 4, 4	15.113	10%	2.845	3.623	COR	-0.482
			5%	3.478	4.335	PIB	0.019
			1%	4.948	6.028	C	4.500
Romania	4, 1, 4	8.179	10%	2.845	3.623	COR	-0.636
			5%	3.478	4.335	PIB	0.213
			1%	4.948	6.028	C	2.681

Source: own calculations

Diagnostic tests, such as the Breusch-Godfrey serial correlation LM test, the ARCH test, the Jacque-Bera normality test, and the RESET specification test were used to test the robustness of the model (Table 4 and 5).

Table 4. Breusch-Godfrey Serial Correlation LM Test

Country	F-statistic	Obs*R-squared	Prob. F(2,12)	Prob. Chi-Square(2)
Bulgaria	0.435886	1.422276	0.6565	0.4911
Hungary	6.458538	14.50750	0.0559	0.0007
Romania	4.921914	12.60003	0.0659	0.0018

Source: own calculations

All tests revealed that the model has the correct econometric properties, it has a correct functional form, and the model residues are uncorrelated in series, normally distributed and homoskedastic. Therefore, reported results are serially uncorrelated, normally distributed and homoskedastic; the reported results are valid for a reliable interpretation.

Table 5. Ramsey RESET Test F-statistic

Country	Value	Probability
Bulgaria	0.409226	0.5335
Hungary	0.106817	0.7570
Romania	0.562724	0.4815

Source: own calculations

The Bounds test allows us to test the significance of a Y (-1) dependent variable period with a long period for both models. The estimated values of these variables are -4.84, -0.21 and -3.15 for Bulgaria, Hungary and Romania.

The results of marginal impact of corruption and of public expenditures on economic growth are presented in Table 3. The negative impact of corruption on economic growth is observed and is statistically significant at a significance level of 1%. This shows that a 1% increase in corruption is delaying economic growth with 0.111% in Bulgaria, with 0.482% in Hungary and 0.636% in Romania, maintaining the constant of other things. These findings are in line with Paksha Paul (2010), Adenike (2013) and Dridi (2013), Shahbaz (2009, 2012).

The results of the Granger causality approach offer long-term relationships (the hypothesis of feedback exists between corruption and economic growth through a unidirectional relationship, between public spending and economic growth through a two-way causal relationship) and short-term (there is a two-way causality between growth economic corruption and corruption. There is also the hypothesis of feedback between corruption and public spending. Finally, unidirectional causality is from public spending to economic growth. The long-term and short-term joint analysis confirms the long-term and short-term causality relationships between variables such as economic growth, corruption and public spending.

5. CONCLUSIONS

This article explored the relationship between corruption and economic growth by incorporating public spending into the growth model using data from Bulgaria, Hungary and Romania for the period 1995-2017. Methodologically, we applied the ARDL co-integration approach to examine the long-term relationship between corruption, public spending and economic growth. The causal relationship between the series was tested by applying the Granger causality approach. Our results have found that long-term relationships exist between variables. In addition, we find that corruption prevents economic growth.

Our findings indicate the negative impact of corruption on economic growth. This implies that the government must take action to reduce corruption by improving governance in Eastern European countries. Improving governance will not only control corruption but also improve the quality of domestic institutions that will have a positive impact on public spending.

References

1) Acemoglu, D. and Verdier, T. (1998). Property rights, corruption and the allocation of talent: a general equilibrium approach. *The economic journal*, 108(450), pp. 1381-1403.
2) Adenike, E.T. (2013). An econometric analysis of the impact of corruption on economic growth in Nigeria. *Journal of business management and Economics*, 4(3), pp. 54-65.

3) Aidt, T. S. (2003). Economic analysis of corruption: a survey. *Economic Journal* 113(491), pp. 632-652.
4) Ajie, H. A. and Wokekoro, O. E. (2012). The impact of corruption on sustainable economic growth and development in Nigeria. *International Journal of Economic Development Research and Investment*, *3*(1), pp. 91-109.
5) Ali, N., Cullen, G. and Gasbarro, D. (2010). The Coexistence of Corruption and Economic Growth in East Asia. Murdoch Business School, Murdoch University, Western Australia, Australia.
6) Asiedu, E. and Freeman, J. (2009). The effect of corruption on investment growth: Evidence from firms in Latin America, Sub-Saharan Africa, and transition countries. *Review of Development Economics*, 13(2), pp. 200-214.
7) Barro, R. J. (1991). Economic growth in a cross section of countries. *The quarterly journal of economics*, 106(2), pp. 407-443.
8) Dridi, M. (2013). Corruption and Economic Growth: The Transmission Channels. *Journal of Business Studies Quarterly*, 4(4), pp. 121-152.
9) Egharevba, M. E. and Chiazor, A. I. (2013). Political corruption and national development in Nigeria. *International Journal of Social Sciences and Humanities Review*, *4*(1), pp. 14-23.
10) Farooq, A., Shahbaz, M., Arouri, M. and Teulon, F. (2013). Does corruption impede economic growth in Pakistan?. *Economic Modelling*, 35(C), pp. 622-633.
11) Gupta, S., Davoodi, H. and Alonso-Terme, R. (1998). Does corruption affect income inequality and poverty? *International Monetary Fund*, Working Paper No. 76.
12) International Monetary Fund (2018). *World Economic Outlook*, April 2018. Retrieved from: https://www.imf.org/en/Publications/WEO/Issues/2018/03/20/world-economic-outlook-april-2018 (Accessed April 29, 2018)
13) Levine, R. and Renelt, D. (1992). A sensitivity analysis of cross-country growth regressions. *The American Economic Review*, 82(4), pp. 942-963.
14) Mauro, P. (1995). Corruption and growth. *The quarterly journal of economics*, 110(3), pp. 681-712.
15) Mo, P. H. (2001). Corruption and economic growth. *Journal of comparative economics*, 29(1), pp. 66-79.
16) Del Monte, A. and Papagni, E. (2001). Public expenditure, corruption, and economic growth: the case of Italy. *European journal of political economy*, 17(1), pp. 1-16.
17) Narayan, P. K. (2005). The saving and investment nexus for China: evidence from cointegration tests. *Applied economics*, 37(17), pp. 1979-1990.
18) Oni, T.P. and Awe, O.O. (2012). Empirical nexus between corruption and economic growth (GDP): a cross-country econometric analysis. *International Journal of Scientific and Research Publications*, 2(8), pp. 426-431.
19) Paksha Paul, B. (2010). Does corruption foster growth in Bangladesh?. *International Journal of Development Issues*, 9(3), pp. 246-262.
20) F R. J. (2001). Bounds testing approaches to the analysis of level relationships. *Journal of applied econometrics*, 16(3), pp. 289-326.
21) Phillips, P. C. and Hansen, B. E. (1990). Statistical inference in instrumental variables regression with I (1) processes. *The Review of Economic Studies*, 57(1), pp. 99-125.

22) Rock, M. T. and Bonnett, H. (2004). The comparative politics of corruption: accounting for the East Asian paradox in empirical studies of corruption, growth and investment. *World Development*, 32(6), pp. 999-1017.
23) Saha, S. and Gounder, R. (2013). Corruption and economic development nexus: Variations across income levels in a non-linear framework. *Economic Modelling*, 31(C), pp. 70-79.
24) Shabbir, G. and Anwar, M. (2007). Determinants of corruption in developing countries. *The Pakistan Development Review*, 46(4), pp. 751-764.
25) Shahbaz, M. (2009). A reassessment of finance-growth nexus for Pakistan: under the investigation of FMOLS and DOLS techniques. *Journal of Applied Economics*, 1–2, pp. 65-80
26) Shahbaz, M. (2012). Does trade openness affect long run growth? Cointegration, causality and forecast error variance decomposition tests for Pakistan. *Economic Modelling*, 29(6), pp. 2325-2339.
27) Svensson, J. 2005. Eight questions about corruption, *Journal of Economic Perspectives,* 19(3), pp. 19-42.
28) Tanzi, V. and Davoodi, H. (1997). Corruption. Public Investment and Growth, *IMF Working Paper*, WP/97/139.
29) Transparency International, (2008-2018). *International Transparency Report, 2008-2018*. [online] Available at: https://www.transparency.org/research /cpi/overview [Accessed 29.04.2018].
30) Ugur, M. (2014). Corruption's direct effects on per-capita income growth: a meta-analysis. *Journal of Economic Surveys*, 28(3), pp. 472-490.
31) Ugur, M. and Dasgupta, N. (2011). Evidence on the Economic Growth Impacts of Corruption in Low-income Countries and Beyond: A Systematic Review. *EPPI-Centre, Social Science Research Unit*, Institute of Education, University of London, London.
32) Zivot, E. and Andrews, D. W. K. (2002). Further evidence on the great crash, the oil-price shock, and the unit-root hypothesis. *Journal of business & economic statistics*, 20(1), pp. 25-44.

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FIRST STEP IN A CONFLICTING DIALOGUE: PRELIMINARY PROCEDURE IN BUDGETARY AND FISCAL LITIGATION

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Abstract
Our study is conducted based on the general observation that contemporary procedures in administrating public resources tend to solve conflicting hypothesis in a similar manner. The central piece of our work is the preliminary procedure (the administrative appeal) within the framework of budgetary and fiscal litigation. In this perspective, we can identify three working platforms: the budgetary procedure of managing public resources, the fiscal procedure of collecting public resources and a particular context of the budgetary procedure for European funds. These platforms share a significant number of similarities regarding litigation, including within the preliminary procedure (a filter effect, strict substantive and formal requirements for the application and a short deadline for submission). The current study leans on analyzing the functions and constraints of this particular preliminary procedure, the role of these elements and also outlining the frame of the concept of preliminary procedure in accordance to the requirements of the right to a fair trial. All these elements generate a rather rigorous path of litigation solving with a background of protecting the weaker side.
Keywords: *administrative appeal, preliminary procedure, budgetary litigation, fiscal litigation.*
JEL Classification: K34, K41

1. GENERAL CONSIDERATION REGARDING PRELIMINARY PROCEDURE

The preliminary procedure is a common procedure for all administrative litigation; the principle is regulated under article 7 of Law no. 554/2004 governing administrative litigation. The normative text stipulates that (1) *Before filing a complaint to the competent administrative court, the person who considers themselves harmed in a right or in a legitimate interest by an individual administrative act shall request to the issuing public authority or the superior*

authority if there is one, within 30 days from the date when the act was communicated, the revocation in whole or in part of the act. (1^1) *In the case of the administrative normative act, the preliminary complaint can be filed at any time. (2) The provisions of paragraph (1) are also applicable in the case where the special law provides an administrative-jurisdictional procedure and the party has not opted for it.*

From the general provision, we can identify some features of the preliminary procedure: (1) the procedure is mandatory and preliminary to addressing the Court (this solution is confirmed by all decisions in administrative litigation that deemed inadmissible all requests that are not preceeded by the preliminary procedure (Costea, 2018)); (2) the procedure is universal, applicable to both administrative individual acts and administrative normative acts; (3) the procedure is all applicable as to the subject of the complaint, a person that considers themselves harmed in a right or in a legitimate interest even if the individual normative act is addressed to themselves or any other legal subject; (4) it is a procedure limited in time, under a short time interval, stipulated for filing the complaint and also for solving the complaint or at least move to the next step, court litigation (article 7 paragraph 4 - *The preliminary complaint filed according to the provisions of paragraph (1) shall be solved within the term stipulated in article 2 paragraph (1) letter. h)* – 30 days n.n.).

In budgetary and fiscal matters, we can traditionally identify three types of litigation (1) budgetary litigation founded on administrative acts issued by the Court of Accounts; (2) fiscal litigation founded on acts issued by tax authorities and (3) European funds litigation based on administrative control acts for the use of European funding.

In budgetary procedures related to controls conducted by the Court of Accounts (CA), the regulation is given by the Decision of the CA no. 155/2014 regarding the approval of *The Regulation on the organization and carrying out of specific activities of the Court of Accounts, as well as the capitalization of the acts resulting from these activities* in paragraph 145, *External public auditors shall mention in the report of found irregularities and the application of the civil penalty stipulated by art. 62 of the Law no. 94/1992, republished, that the verified entity has the right to contest the report at the administrative and fiscal contentious divisions within the tribunal/court of appeal, in whose territorial jurisdiction the office of the verified entity is registered, according to the law of the administrative contentious, 15 calendar days after its communication, and the fact that a possible appeal suspends the execution of the decision* and paragraph 156. *The external public auditors shall mention in the report the violation of the obligations stipulated in article 5 paragraph (2) and the application of the penalties stipulated in article 63 of Law no. 94/1992, republished, that the verifiable entity has the right to contest the report at the administrative and fiscal contentious divisions of the tribunal/court of appeal in*

whose territorial area the registered entity is located, under the terms of the administrative contentious law, within the 15 calendar days from its communication, and the fact that a possible appeal suspends the execution of the decision. Therefore, we can easily observe a number of elements in the provision: (1) the general regulation is applicable, as the special norm refers to the application in the general provisions of Law no. 554/2004, the law of administrative contentious; (2) referring to the general provision is applicable as to the mandatory character of the preliminary procedure. Even if the special norm evokes the action before the Court as a remedy for opposition to the control act, the fact that the special norm put the procedure under the general provisions of Law no. 554/2004 maintains all general provisions as applicable. As to the procedure for solving this preliminary complaint, Decision of the CA no. 155/2014 clarifies elements regarding the competence within the Court of Accounts for resolving these complaints, the possible solutions to the complaints, the form and content of "conclusions" delivered by the appeal board, including paragraph 223 *c) to specify the means of appeal, namely, by a petition for the competent administrative litigation court, to annul, in whole or in part, the conclusion, under the law of the administrative contentious.* A certain particularity arises as the delays in these procedures are set at 15 days, derogating from the general provision of Law no. 554/2004 establishing 30 days.

In fiscal procedures, the right to appeal is regulated by article 268 of the Fiscal Procedure Code, with a rather intriguing construct: (1) *Against the debt title, as well as against other fiscal-administrative acts, a complaint may be filed under this title. The complaint/appeal is an administrative appeal and does not dismiss the right to file a complaint in a court of law of the person who claims their rights were infringed by a fiscal-administrative act. (2) Only the person who considers that their rights were infringed by a fiscal-administrative act is entitled to file a complaint.* From this definition, we can extract a series of particularities or even critics, such as (1) the normative accent is on the debt claim, with no particular reason other than the recurrence of this fiscal-administrative act; (2) there is no reference norm to Law no. 554/2004, absence that combined with the mention *does not dismiss the right to file a complaint in a court of law* has generated an early jurisprudence as to the optional character of the preliminary procedure; (3) the law indicates as subject of the procedure only the person who *claims had their rights infringed by a fiscal-administrative act.* The subsequent articles indicate the delay for filing the complaint, the competent authority to solve the complaint, the procedure to be followed for solving the complaint, the possible solutions to the complaint and the content of the decision for solving the preliminary appeal. In the case of the absence of an act, the court will be addressed immediately, without completion of the administrative appeal procedure.

In European funding procedure, the right to appeal is regulated under article 46 of Government Emergency Ordinance (GEO) no. 66/2011 [Official Gazette of Romania, Part I, no. 461 of 30th of June 2011]: (1) *Against the debt title a complaint may be filed under the terms of this Emergency Ordinance. (2) The complaint is an administrative appeal and does not dismiss the right to file a complaint in a court of law of the person who considers themselves to have their rights violated by an administrative act, according to the law.* The provision in matter of European funds is extremely similar to the one in fiscal matters, with some common elements: (1) we can observe the same accent on the debt title, as long as any administrative acts in the procedure should be contestable and that is due to general provision of administrative law; (2) we can observe the same lack of a reference norm, a little more diluted in this case, but still without indicating the general provisions of Law no. 554/2004; (3) the norms contain the same provisions as to the nature of this litigation stage, *an administrative appeal* in correlation to the perpetual possibility of addressing the court. This possibility does not, under any circumstance, grant a direct access to a court, but only through the preliminary procedure. The rest of the procedure maintains the same degree of similarity, as we will underline along the present study.

2. THE OBJECT AND FUNCTIONS OF THE PRELIMINARY PROCEDURES

As a common element, these procedures are written ones (in a fiscal context, an oral debate is possible) with limited contradictory and no guarantees as to the independence of the solving authority.

These preliminary complaints also have a common content, with nuances deriving from their object. Preliminary complaint in budgetary procedures before the Court of Accounts has no normatively established content; in a similar approach, we can consider that it will contain, apart from the identification elements, the core of the complaint, as the factual and legal motives for the illegality of the contested administrative act. The preliminary complaint in this procedure can be filed against an administrative act, paragraphs 145, 156 and 213 from Court of Accounts' Decision (CA Decision) no. 155/2014 [Official Gazette of Romania, Part I, no. 547 of 24th of July 2014] mentioning *the minute (memorandum) for irregularities found* and *the decisions of the CA's structures.* These are administrative acts under the filter of the general definition in article 2 paragraph 1 lit. c) from Law no. 554/2004, as they tend to determine, modify or extinguish a legal relation, with public authority. The content of these acts, as the legal text indicates, has the elements for identifying an irregularity, applying a sanction or establishing a certain debt or even non-patrimonial measures for the verified authority to put in action. The demand in the complaint is centred on the annulment of the administrative act containing these provisions. The demand in the complaint is the base for the demand in front of the Court. Therefore,

determining the object of the administrative appeal is relevant to the case in Court, not only as to the object of the claim, but also as to the extent of the legality critics. For example, a decision can contain multiple points and not all are contested; the action before the Court is limited to those points that had been previously criticized through the administrative appeal and thus have been reanalysed and confirmed by the administrative authority. However, we ask ourselves whether the administrative complaint must exhaust all arguments in favour of the case or if new arguments can be brought for the first time before the Court. To the first question, the administrative complaint must cover all matters that will be evoked in Court and most of the arguments to be delivered in Court. To the second question, we have no doubt the answer is affirmative as long as new arguments can emerge from the preliminary procedure and new arguments are admissible in judiciary appeal (recourse), *a fortiori* in the complaint against an administrative procedure.

The preliminary complaint in fiscal procedures is heavily regulated by article 269 and following of the Fiscal Procedure Code, as to the content of the complaint: identification information, object of the complaint, factual and legal reasons, evidence on which it is based, signature. As to the object of the complaint, paragraphs (2) and (3) set some specific standards: *The object of the complaint is only the amounts and measures established and recorded by the tax authority in the debt title or the fiscal-administrative act* (...) *In disputes involving sums, the total contested amount will be mentioned, individualized by categories of taxes, as well as their accessories.* At this level, we can identify two dimensions of the legal effects and, consequently, two dimensions of the preliminary complaint. Firstly, the fiscal-administrative act could be a debt title, so it contains at least one debt; in this case, the complaint will demand the annulment of the debt title and will contest the grounds of that debt as to the eligibility or even as to the calculus. If the sum was already paid, a subsequent request could be the return of that amount. Secondly, the fiscal-administrative act could contain only non-patrimonial measures (usually related to non-patrimonial obligations of the taxpayer, such as accounting procedures or necessary authorizations); in this case, the complaint will also demand the annulment of the fiscal-administrative act, thus the cease of the imposed measure.

The preliminary complaint in European funding also has a patrimonial dimension; as previously shown, article 46 of GEO no. 66/2011 indicates as object of the complaint only the debt title. This title is, of course, objectionable in specific conditions, especially if the amount is formed out of multiple elements. In this case also, we can affirm that the formatting of the complaint will be maintained throughout the litigation.

As to the functions of these preliminary procedures, we can identify a common purpose, similar to the exposure of evidence in criminal cases. As the plaintiff will motivate the preliminary complain, he will determine the general

framework of the case in Court, as to the object, but also as to the arguments and criticism he brings. These arguments are brought before the administrative authority, which usually sets in motion a special body to analyze these arguments and (i) admit them, with the consequence of the annulment of the act if these arguments are pertinent; (ii) reject them with a supplementary motivation; (iii) suspend their analysis to the purpose of obtaining supplementary information or legal solutions, even from a criminal procedure. In this phase and through this analysis, the administrative authority will evaluate its own actions and decide on the matter on the basis of all available information. For this reason, further procedures in front of the Court cannot extend the object of the cause and should bring limited new elements, those answering to the arguments of the administrative appeal.

Secondly, this openness in presenting arguments contributes to the contradictory of the procedure. Both parties can assess the validity of the arguments and the further faith as to the solution of the case. Even if the solution of admission is statistically frail, the function is to exempt further judiciary efforts. These functions are also briefly synthesized in the constant jurisprudence of the Romanian Constitutional Court (RCC), such as Decision no. 687/2008 [Official Gazette of Romania, Part I, no. 563 of 25th of July 2008]:

> *... stating in a consistent manner that "the establishment of a preliminary or graceful appeal is a simple, quick and exempt of stamp duty way, where the person harmed in a right by a public authority has the possibility to obtain recognition of the claimed right or of his legitimate interest directly from the issuing authority. Thus it is ensured, on the one hand, the protection of the harmed person and of the administration, and, on the other hand, the relieving of the administrative courts of those litigations that can be settled administratively, expressing the principle of celerity. The Court also noted that "no constitutional provision prohibits from filing a preliminary administrative procedure without a judicial nature, such as the graceful administrative procedure or the hierarchical administrative procedure".*

3. PRELIMINARY PROCEDURE AND THE STANDARDS OF A FAIR TRIAL

Against the conclusion/decision for solving the administrative appeal in the sense of rejecting it or even admitting it on unsatisfactory grounds, the plaintiff can act in court by submitting the administrative act and the administrative appeal decision to judiciary control. According to article 8 of Law no. 554/2004, the object of the action in court is, if an administrative act has been issued, determined in two hypotheses: *A person harmed in a right recognized by law or in a legitimate interest by a unilateral administrative act, (1) dissatisfied with the answer to the preliminary complaint or (2) who has not received any reply within the time limit provided in article 2 paragraph (1) letter h), may file a*

complaint with the competent administrative court, requesting the total or partial annulment of the act, the repair of the damage caused and repair for moral damages.

Therefore, the general regulation in administrative litigation is that the right to file a complaint to the court is born when (1) the preliminary complaint is rejected or (2) the preliminary complaint is not solved. This equation is applicable in budgetary litigation, as the CA's Decision no. 155/2014 indicates no specific procedures.

As to the fiscal procedure (Dascălu, 2016), the legal accent is set on the completion of the preliminary procedure; art. 281 of the Fiscal Procedure Code in paragraph (2) stipulates that *Decisions issued in the resolution of preliminary complaints, together with the fiscal administrative acts to which they refer, may be challenged by the contestant or by the persons entered in the procedure for settling the appeal, to the competent administrative court, according to the law.* Hence, this accent has generated a significant case-law establishing that in this matter (especially in tax litigation due to the frequency of the requests), the court can be rightfully addressed with an action against the decision issued in the resolution of the preliminary complaint. Lacking such a decision, the plaintiff is unable to address the court, unless a special right is activated, such as the right stipulated by article 281 paragraph (5) of the Fiscal Procedure Code, a text limited to tax litigation: *If the preliminary complaint is not solved within 6 months from the filing of the complaint, the contestant may address, for annulment of the act, the competent administrative court according to Law no. 554/2004 (...).* This secondary solution is applicable only to tax litigation. Therefore, the right to address the court arises in two different moments: (1) when receiving the decision for solving the preliminary complaint; (2) when the term of 6 months expires.

This filter has been analyzed in multiple cases in tax matters by the Constitutional Court, which confirmed the compatibility of the right to access to justice with these particular procedures:

RCC Decision no. 687/2008: *In addition, it has been shown that the right of free access to justice is not an absolute right, and may be subjected to certain conditions. Accordingly, the Court held that "the prior administrative, mandatory, non-jurisdictional administrative procedure does not restrict the right of free access to justice, as long as the decision of the administrative body can be challenged before a court.*

RCC Decision no. 95/2011 [Official Gazette of Romania, Part I, no. 320 of 10th of May 2011]: *the person who considers themselves harmed in their rights by the lack of a fiscal administrative act may appeal to the court for obliging the fiscal authority to issue the decision to settle the appeal.*

RCC Decision no. 703/2014 [Official Gazette of Romania, Part I, no. 64 of 26 January 2015]: *the Court also held that, in all cases, after the tax*

authority has given its decision, the unsuccessful complainant may appeal that decision to the competent administrative court.

With reference to the European funds procedure, we can argue that the special regulation embraces the same solution as article 51 of GEO no. 66/2011 paragraph (2) stipulates that the *Decisions issued in the resolution of preliminary complaints may be appealed by the opposing party to the competent administrative court, in accordance with the provisions of Law no. 554/2004.* In this case, in the absence of a special secondary term for completing the administrative procedure, it is certain that the court can be addressed only in the presence of a decision to solve the preliminary complaint, this filter being extremely clear and limitative.

In this context, as the administrative procedures in financial-fiscal litigation are so strict, one could wonder how these procedures are reconcilable with human rights. The jurisprudential developments of recent years promote a certain proximity; human rights can be a fundamental aspect of fiscal policies, given their tendency to limit the measures states can impose on taxpayers. Jurisprudential accents show an extension of human rights principles in taxation in order to set those limits and create a balance between the state's sovereign power and the taxpayers' rights. Some applicants rely on the European Convention of Human Rights to challenge fiscal-administrative procedures and provisions in states members of the Convention, most frequently invoking the protection of article 1 of Protocol 1. Other applications were submitted to the European Court of Human Rights citing the protection of article 8 (Right to respect for private and family life [ECHR, Case of André and Another v. France (Application no. 18603/03)]) and even article 9 (Freedom of thought, conscience and religion [ECHR, Affaire Association Les Temoins de Jehovah c. France (Application no. 8916/05)]), but what mostly concerns the scope of the present study is the protection of article 6 (Right to a fair trial).

The right to a fair trial dictates a set of standards that become relevant in fiscal-administrative procedures, though this has not always been a given. In the highly criticized and controversial case of Ferrazzini v. Italy [ECHR, Case of Ferrazzini v. Italy (Application no. 44759/98)], the Court held that:

30. The principle according to which the autonomous concepts contained in the Convention must be interpreted in the light of present-day conditions in democratic societies does not give the Court power to interpret Article 6 § 1 as though the adjective "civil" (with the restriction that that adjective necessarily places on the category of "rights and obligations" to which that Article applies) were not present in the text. 31. Accordingly, Article 6 § 1 of the Convention does not apply in the instant case.

The standards of a fair trial have been extended to the tax procedures, more as a general standard in connection with the national civil procedures. The content of the right to a fair trial includes the right of access to a court and for

this right to be effective, *"an individual must have a clear, practical opportunity to challenge an act that is an interference with his rights"* [ECHR, Case of Bellet v. France (Application no. 23805/94)]. In our opinion, in financial-fiscal litigation, two problems arise in the context of effectively accessing a court: (1) the length of the procedures, which frequently exceeds what is considered to be a reasonable and (2) the existence of procedural barriers that might prevent or limit the possibility of accessing a court.

We can ask ourselves if the preliminary procedure in budgetary and fiscal litigation is a challenge to the right of access to a court, given the fact that following (with cases where following means closing the procedure) the preliminary procedure is a mandatory step before filing a formal complaint to the court. Failure to comply with the preliminary procedure in the strictly imposed deadline will be sanctioned with the inadmissibility of the claim. An attempt to re-address the court is set to fail given the short terms in which the law forces the taxpayer to act, thus it could be argued that this measure is an excessive or an unreasonably strict one and contrary to article 6, given the fact that *"any limitations must not restrict or reduce a person's access in such a way or to such an extent that the very essence of the right is impaired"* [ECHR, Case of Pérez De Rada Cavanilles v. Spain (116/1997/900/1112)].

Assuming that the taxpayer does follow the preliminary procedure and such a procedure is not excessive, the entire process entered is a rather lengthy one. What is more, the tax authority might not answer to the administrative appeal in due time. In such a case, the taxpayer cannot address the court with the main claim, but only with a request for the court to force the tax authority to issue an answer to the administrative appeal. Either way, it seems that it is up to the public authority to determine the course and timeline of all actions and practice shows that procedures tend to be unjustifiably and inexplicably long. This scenario has been deemed as a significant filter in the access to the court: *Contrary to the reasoning of the Constitutional Court, we believe that the passage of three distinct processes – preliminary appeal, action to oblige the authority to issue a response, the action for annulment of the administrative act – and the enforcement of one of these does not meet the conventional accessibility standard* (Lazăr, 2015). The direct access to a judge is filter by two procedures that delay the solving of the request and further burden the plaintiff.

As to the duration of the procedures, we can identify three different legal regimes, all derogatory from the general provisions of article 8 of Law no. 554/2004 correlated with article 2 paragraph 1 letter h), as follows: (1) in budgetary procedures, the term for formulating the preliminary complaint and for solving this appeal is 15 days; (2) in fiscal procedures, the terms are 45 days; (3) in European funds procedures, the terms are 30 days. As to the moment when the right to address the court is born, all procedures have different quantum; in budgetary procedures, the right to address the court is born at the expiration of

the term for solving the preliminary complaint; in fiscal procedures, the right to address the court is born at the expiration of the 6 months delay from the introduction to the preliminary complaint; in European funds procedures, the right to address the court is born at the communication of the decision for solving the preliminary complaint, an indefinite moment.

4. CONCLUSIONS

The study allowed us to identify a number of three specific regulations in matters of financial-fiscal procedures, which are all derogatory from the general regime of disputing administrative acts with budgetary or fiscal effects. These regimes maintain the principle of mandatory preliminary complaint, but approach differently the content and the role of this procedural step. Firstly, the object of the procedure is regulated under different intensities; the delays in the procedures are various, as well as the moment of the birth of the right to address the court. Secondly, some similarities are maintained, as to the core of the procedure: content of the complaint, procedural rules for solving the complaint, means of disputing the administrative solution. Therefore, in this context, the study raises an unanswered question: are all these differences grafted on a common procedure a subversive attack to the right to a fair trial? And do all these particularities maintain a common standard of opportunity and content of the right of a fair trial?

References

1) Costea, I.M. (2018). *Controlul fiscal*. Bucuresti: Hamangiu Publishing House.
2) Dascălu, D. (2016). *Contenciosul fiscal*. Bucuresti: Hamangiu Publishing House.
3) Lazăr, G.A. (2015). Contestaţia împotriva deciziei de impunere fiscală în lumina Convenţiei europene a drepturilor omului (Appeal against the notice of assessment in the light of the European Convention of Human Rights). *Revista Română de Drept Privat (Romanian Review of Private Law)*, Issue 06/2015, p. 118.

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NON-CURRENT ASSETS DEPRECIATION AND IMPAIRMENT BETWEEN LEGAL, ACCOUNTING AT TAX RULES: EVIDENCE FROM ROMANIA

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Abstract
The study analyzes the evolution of the Romanian accounting rules on the depreciation and impairment of tangible assets, with the identification of several characteristic indicators for Romanian listed companies. In terms of evolution, the rules are fairly stable over time, but with numerous adaptations that bring them closer to international standards and with a de jure *evolution that leads to the disconnection of accounting from taxation. The share of tangible assets in the listed companies' balance sheets is significant (around 50% on the regulated market and 60% on AeRo). This leads to a significant impact of the depreciation and impairment charges on the financial indicators of listed companies (over 50% and 80% of EBITDA, respectively). The most-used method of depreciation is the straight-line method, with a severe decrease of the use of the accelerated method when applying IFRS. In audit reports for listed companies, in the case of modified opinions, there are often references to depreciation, impairment and revaluation of fixed assets.*
Keywords: *non-current assets, depreciation, amortization, material impact on EBITDA, book-tax (dis)connection.*
JEL Classification: M40

1. INTRODUCTION

A very common element in the financial accounting and financial management literature is the depreciation of fixed assets. In some more advanced debates, in addition to depreciation, the impairment of fixed assets is also taken into account. Apart from the technical aspects of the two accounting categories, it is important to highlight their effects of financial indicators reported by companies in the financial statements: income, equity, total fixed assets, working capital, etc.

The purpose of our study is to identify the key moments in the evolution of accounting and tax regulations regarding the depreciation of fixed assets (whether irreversible or reversible), with the emphasis on the influences that directed this evolution. Also, having data provided by Romanian listed companies on the Bucharest Stock Exchange (BSE), we propose to analyze the methods for which listed companies opted for depreciation, the nominal impact

of asset depreciation on some performance indicators, as well and any observations of financial auditors regarding depreciation of fixed assets.

The structure of the papers includes: description of the main normative acts regulating the depreciation/impairment of fixed assets (section 2), the emphasis on the impact of the fixed assets and their depreciation on some financial indicators of listed companies (section 3), followed by conclusions.

2. EVOLUTION OF THE ACCOUNTING AND TAX REGULATIONS ON FIXED ASSTES DEPRECIATION

Currently, the rules regulating the depreciation of fixed assets are found in a series of normative acts with different destinations. We refer to depreciation in accounting rules (especially in OMFP 1802/2014), in Law 15/1994 on the amortization of tangible and intangible fixed assets, but also in tax regulations (Law 227/2015 on the fiscal code). These regulations are, in some aspects, complementary, but there are differences that sometimes force companies to have two series of depreciation calculations. The theoretical justification of asset depreciation/impairment consists in mobilizing in particular the accrual accounting rules and the accounting principles of prudence (Toma and Robu, 2014).

Prior to 2004, the accounting and tax depreciation was governed unitarily, by law 15/1994 and by the accounting rules, which means that there were no differences between the accounting and tax calculations. Regarding the impairment of fixed assets, the accounting rules included the technical elements that would allow it to be recognized as charges and reversed, if necessary. Without empirical data to confirm our hypothesis, we can assume that in the 1990s and in the early part of the 2000s, the reversal of impairment of assets in other contexts rather than the accounting literature (books and journal articles) was rather inexistent. We base our assumption on the fact that the hyperinflation that characterized that period has led to significant increases in the fair values of fixed assets, so that there were no preconditions for finding too many unfavorable differences between the recoverable amount and the net book value of the fixed assets. On the contrary, this period (up to 2003-2004) was one in which many companies opted for recognizing favorable differences through revaluation, opting for the fair value model.

Given the specification of the tax code that says *"for fixed assets with limited useful life, tax depreciation deductions shall be determined without taking into account the accounting depreciation"* (applicable explicitly since 2004, with the entry into force of the first version of the tax code - Law 571/2003), it results that, in Romania, accounting depreciation and tax depreciation are *de jure* disconnected. This would lead to the keeping of two series of record for the book values and tax values of the fixed assets, respectively for the accounting and fiscal depreciation. In fact, we can assume that an important part of

companies opts for methods of accounting depreciation that coincide with the fiscal one, so that they only keep a single set of records.

The *de jure* disconnection of the tax and accounting depreciation was explained by the influence of the International Accounting Standards (IAS/IFRS) that came to Romania in the late 1990s and which were partly found in the Romanian Accounting Standards (RAS) starting with the financial statements of the financial year 2000, after their application in 1999 for a sample of representative companies (OMF 403/1999, replaced by OMFP 94/2001). These attempts to introduce in the Romanian accounting some rules that better reflect the economic background of the transactions continued, even if, only from 2010, the accelerated depreciation is recognized by the accounting regulations as being rather fiscal and not recommended in terms of reporting financial.

This disconnection between the accounting and the tax standards regarding the tangible and intangible assets and their depreciation is also found in different rules for determining the lifetimes of non-current assets. Even if Law 15/1994 obliges the Finance Ministry to review the recommended (tax) lifetime at 5 years, the last normative act in this respect - mandatory but not necessarily in accounting - is GD 2139/2004. Ristea (1998, pp. 169-170), before the legal introduction of the separation between accounting and tax depreciation, advocates this distinction, in order to avoid fiscal pollution of the accounting figures. However, there are still many Romanian companies that depreciate on the tax lifetime of this government decision, despite the fact that the limits provides in this regulation often prove to be far from the real useful life. For example, Law 15/1994 sets five years for the depreciation of software, while the tax code limit this period to three years - the consequence is that many companies depreciate for 3 years, although they use these software – with some improvements – for very long periods of time, some even over 10 years.

In the same line, the accounting definition of tangible fixed assets has two components: the destination and the useful life. The tax definition retains these two criteria, but also adds a minimum value condition. Here too, many companies retain the 2,500 lei (currently valid) as the accounting threshold for differentiating between tangible assets and inventory items, although the accounting rule allows for a great deal of flexibility in this respect.

As for the value differences generated by others causes than the systematic depreciation of fixed assets – i.e. impairments and revaluation –, the accounting rules have evolved to what is required by international standards. From the fiscal point of view, positive revaluations were generally recognized, provided they were performed in accordance with the law. Conversely, impairments do not benefited from tax deduction, which may lead to different book value and fiscal base for same fixed assets.

Concerning the tax impact of the fixed assets depreciation, we could find a brief description of the development of depreciation rules in Romania in Spengel

et al. (2012). While depreciation seems not to trigger the broadening of the corporate income tax base (Spengel *et al.,* 2012), it does however significantly lowers the firm-specific effective tax rates (Lazăr, 2014).

3. COMMENTARIES ABOUT THE INFLUENCE OF THE NON-CURRENT ASSETS DERPECIATION AND IMPAIRMENT ON SOME ACCOUNTING NUMBERS

Tangible assets are, by far, the most important item in balance sheet structure of listed Romanian companies. In Table 1, we calculated the weight of tangible assets in the total assets of the analyzed Romanian listed companies: it is seen that on average of this structure has around 50% for companies listed on the regulated market, to reach around 60% on the alternative market (AeRo). Starting from the share of tangible assets (and intangible ones, although the latter is very small: 1.11% on the regulated market and 0.60% on AeRo), it also result very important charges related to the depreciation and impairment. These expenses represent one of the main components of non-monetary elements that have an impact on the accounting income, but do not affect cash flows. In the accounting/financial literature, when measuring the quality of financial reporting, an accruals variable is often taken into account, including depreciation expense (Huian, Mironiuc and Chiriac, 2018). We do not intend to apply more or less sophisticated econometric models to measure the effects of fixed asset depreciation on the quality of financial reporting, but we will limit ourselves to presenting some descriptive elements on the impact of depreciation/impairment.

3.1 Sample and data

The sample analyzed in our paper consists in all Romanian companies listed on the regulated market, as well as on the AeRO segment. In Table 1, we provide some relevant data about these companies.

The data availability made us keep the 2000-2016 period for companies listed on the regulated market and 2010-2016 for those listed on AeRo. We chose 2000 as a starting point in the analysis because it is the year for which the financial statements of listed companies and other Romanian companies were prepared in accordance with OMFP 94/2001, with some explicitly influences of IAS. We have eliminated financial companies (banks, investment funds and other financial intermediaries) because the share of assets that interest us is low in their case, and because data on depreciation costs is not always explicitly available in the financial statements of these companies. We have also removed businesses for which we have been unable to identify depreciation charges for tangible and intangible assets.

Firstly, we find that, for companies listed on the regulated market, the weight of tangible assets in the balance sheet has a decreasing trend, more

pronounced with the transition to IFRS, while on AeRo, on the contrary, it appears a slight increase.

Table 1. Components of the sample and weight of tangible fixed assets

Year	Companies listed on the regulated market			Companies listed on AeRo		
	N	IFRS /RAS	Average of the weight of the tangible assets in total assets (%)	N	IFRS /RAS	Average of the weight of the tangible assets in total assets (%)
2016	72	IFRS	46.13	292	RAS	61.67
2015	73	IFRS	45.84	299	RAS	60.08
2014	76	IFRS	44.47	306	RAS	59.91
2013	77	IFRS	46.47	305	RAS	60.12
2012	77	IFRS	47.58	305	RAS	58.38
2011	78	RAS	51.97	297	RAS	58.73
2010	78	RAS	51.79	290	RAS	56.57
2009	79	RAS	52.69	-	-	-
2008	78	RAS	50.66	-	-	-
2007	78	RAS	51.85	-	-	-
2006	68	RAS	51.07	-	-	-
2005	63	RAS	49.95	-	-	-
2004	61	RAS	48.59	-	-	-
2003	59	RAS	50.22	-	-	-
2002	49	RAS	51.34	-	-	-
2001	45	RAS	49.63	-	-	-
2000	39	RAS	51.53	-	-	-
Total	**1,150**	**-**	**49.43**	**2,094**	**-**	**59.36**

In the financial statements of these companies, we looked for the following data:

- the subsequent valuation model for tangible assets (cost and/or revaluation);
- the depreciation method for tangible and intangible assets;
- the amount of the depreciation/impairment charges in the profit and loss account compared to EBITDA;
- the explanations given by the financial auditors in justifying the modified opinion, if these explanations relate to tangible and intangible assets.

3.2 Results

In the following we make a descriptive analysis of the main elements found in the financial statements of Romanian listed companies.

3.2.1 The choices of the Romanian listed companies for the revaluation of fixed assets

In the case of the measurement after recognition for tangible assets, the Romanian firms had and have to choose between the well-known cost model, on the one hand, and the model of fair value (revaluation), on the other. For many years, the evolution of prices in Romania and the lack of inflation accounting made the only available means of updating the value of assets to be the revaluation of tangible fixed assets. Besides the reasons for the presentation of fixed assets to a fair value, the revaluation had another important explanation reason in Romania: the tax on buildings was set at much higher rates for unrevaluated fixed assets. As the basis for calculating the tax was (until 2015) the gross book value of buildings, an overwhelming majority of Romanian companies opted for revaluation even after the significant fall in inflation. Starting in 2016, once the tax revaluation (to establish the tax base for the calculation of building tax) was disconnected from the book valuation, the premises were created for companies to abandon the accounting revaluation, thus simplifying the records. In our sample, we meet companies that reevaluate all tangible assets, but most are limited to revaluing buildings and possibly land (see Table 2 - a similar statistic for a different period and only for the regulated market is found in Istrate, 2012).

Data provided in Table 2 confirm that the Romanian listed companies use the revaluation of tangible assets on a large scale: by adding the percentages on the two columns with firms that revaluate (total or only buildings and/or land), we get an average of 88% for the regulated market and of 80% on the AeRo market. On the other hand, if on the AeRo market the percentages are relatively constant for the two categories of companies that reevaluate, we see a significant trend on the regulated market to reevaluate only the buildings and/or the land (from 10% in 2001 to 49% in 2016), detrimental to the revaluation of all categories tangible fixed assets (from 79% in 2001 to 33% in 2016). This type of revaluation behavior is also found by Bunget and Dumitrescu (2012), the authors believing that selective revaluation of immobilizations can be achieved, which is contrary to accounting rules. The biggest difference is the transition from 2011 to 2012, i.e. exactly with the transition to IFRS. Probably the application of international standards has led to a reorientation of firms in terms of revaluation, especially since for fixed assets fair value could be used as the deemed cost at the date of transition. On AeRo, even if two series of rules have changed (OMFP 3055/2009 and OMFP 1802/2014), the similarities between them - in terms of revaluation - have led to relatively constant figures throughout the period.

Table 2. Fair value model for the Romanian listed companies

Year	Companies listed on the regulated market			Companies listed on AeRO		
	Available observations	Complete revaluation	Selective revaluation (buildings and land)	Available observations	Complete revaluation	Selective revaluation (buildings and land)
2016	72	24 (33.33%)	35 (48.61%)	237	58 (24.47%)	128 (54.01%)
2015	73	26 (35.62%)	34 (46.58%)	250	70 (28.00%)	131 (52.40%)
2014	76	26 (34.21%)	37 (48.68%)	254	70 (27.56%)	139 (54.72%)
2013	77	28 (36.36%)	38 (49.35%)	253	70 (27.67%)	134 (52.96%)
2012	77	31 (40.26%)	32 (41.56%)	241	61 (25.31%)	129 (53.53%)
2011	78	31 (39.74%)	32 (41.03%)	235	60 (25.53%)	129 (54.89%)
2010	78	40 (51.28%)	32 (41.03%)	225	53 (23.56%)	124 (55.11%)
2009	79	39 (49.37%)	36 (45.57%)	-	-	-
2008	78	39 (50.00%)	34 (43.59%)	-	-	-
2007	78	44 (56.41%)	29 (37.18%)	-	-	-
2006	68	40 (58.82%)	24 (35.29%)	-	-	-
2005	63	42 (66.67%)	16 (25.40%)	-	-	-
2004	61	40 (65.57%)	13 (21.31%)	-	-	-
2003	59	39 (66.10%)	12 (20.34%)	-	-	-
2002	49	34 (69.39%)	9 (18.37%)	-	-	-
2001	45	33 (73.33%)	6 (13.33%)	-	-	-
2000	39	31 (79.49%)	4 (10.26%)	-	-	-
Total	**1,150**	**587 (51.04%)**	**423 (36.78%)**	**1.695**	**442 (26.08%)**	**914 (3.92%)**

3.2.2 Methods of fixed assets depreciation applied by the Romanian listed companies

In the case of fixed assets depreciation, it is presumed that most companies use the straight-line method, as is often the case for companies listed on various stock exchanges around the world. Analyzing data from our sample, we found that from all the companies that have reported depreciation method, only two companies did not use the straight-line method, applying:

- one of them, just the diminishing balance method for 4 consecutive financial years, then switched to a straight-line and diminishing balance methods combination for four other financial year;
- another company applied the units of production method during the whole analyzed period.

The generalized use of the straight-line method of depreciation is probably due to the fact that it is the simplest. In other samples (e.g. in Duțulescu, 2015, on a sample of 10 Romanian firms and 100 foreign firms), the use of the straight-line method is still very frequent, but only 41% of the firms use only this

method, the units of production and the diminishing balance are also quite common.

In Table 3, we have centralized data about companies that declare a different depreciation method, apart from the straight-line one: it's about diminishing balance combined with accelerated depreciation, and diminishing balance and the units of production method.

Table 3. Depreciation methods, others than straight-line method, for the Romanian listed companies

Year	Companies listed on the regulated market			Companies listed on AeRo segment		
	Diminishing balance method	Accelerated method	Units of production method	Diminishing balance method	Accelerated method	Units of production method
2016	1/72	0	4	0/237	4	1
2015	1/73	0	4	0/249	3	2
2014	2/76	0	4	0/249	3	2
2013	2/77	0	5	1/247	3	2
2012	2/77	0	4	1/237	3	2
2011	3/78	5	3	1/231	3	2
2010	3/78	6	2	1/222	3	2
2009	5/79	5	2	-	-	-
2008	6/78	6	2	-	-	-
2007	5/78	6	2	-	-	-
2006	5/68	8	1	-	-	-
2005	5/63	9	1	-	-	-
2004	4/61	9	1	-	-	-
2003	4/59	9	1	-	-	-
2002	3/49	7	1	-	-	-
2001	4/45	7	1	-	-	-
2000	2/39	5	1	-	-	-

We know that accelerated method and sometimes even the diminishing balance method could be qualified as tax methods, given the rhythm of the recognition as an expense of the carried value of the fixed assets, rhythm not necessarily corresponding with the real depreciation of the assets. The two methods have always been accepted by the Romanian accounting standard (though sometimes conditioned), and this explains their constant use by some AeRo firms. However, the use of accelerated/diminishing balance methods on AeRo is extremely low - between 1% and 2% of all companies surveyed. On the

contrary, for companies listed on the regulated market, the use of diminishing balance and accelerated depreciation methods seems to have been more intense, especially in the context of the application of Romanian accounting rules (around 10% for accelerated, slightly less than 10%, for diminishing balance method). However, the transition to the IFRS in 2012 has had important effects on the depreciation method, in the sense of the disappearance of the accelerated method (a tax method which use in accounting is difficult to justify), as a result of specific financial reporting restrictions. That does not mean that these companies can not use the accelerated method, but its use is exclusively reserved for the tax records, not to influence the accounting depreciation and the book value of assets. The transition to IFRS has led to a slight increase in the frequency of use of units of production method, although the number of companies involved remains very small and perhaps their activities are sufficiently specific as to justify the use of such a method.

3.2.3 Impact of the depreciation expense on EBITDA

The large share of tangible assets in the total assets of the Romanian listed companies - partially explained by the systematic and almost generalized revaluation of these assets, but especially of the constructions and land - creates the premises for the calculation of a large depreciation cost, to which can be add also the expense/income from impairment of tangible and intangible assets. In order to highlight the share of such expense, we have made the ratio of these expenses to EBITDA. We have avoided using the operating income because it is established after the depreciation/impairment charge has already been taken into account. In order not to distort the results, we removed the observations with negative depreciation/impairment expense (two observations on the regulated market and nine on the AeRo market). Also, because we are interested in the absolute weight, we have put the results in absolute value, taking into account the negative EBITDA (144 observations on the regulated market and 551 on Aero). The calculation shows an extremely large share of depreciation/ impairment in EBITDA, as an average: over 90% on the regulated market and over 600% for AeRo. These figures can be considered exaggerated, which is why we proceeded to eliminate outliers. We chose to replace the observations below the 5 percentile with the size of the 5 percentile and the observations above the 95th percentile with the value associated with it. Once this normalization of outliers, we obtain the weights for regulated market 51.80% (median 39.23%) and 85.97% on AeRo (median 52.03%) – see Table 4.

Apart from the fact that the companies applying RAS on the entire period (those listed on AeRo) have an extremely large share of the depreciation expenses in EBITDA, we can see in Table 4 that for the listed companies on the regulated market the weights are significantly smaller than on AeRo, with a slight upward trend until 2008. For 2009 and 2010, the share rises strongly,

probably due to the effects of the financial crisis, which led to the occurrence of impairment of fixed assets following the application of specific impairment tests.

Table 4. Share of depreciation/impairment expense in EBITDA

Year	Companies listed on the regulated market		Companies listed on the AeRo segment	
	N	Weight of depreciation/impairment expense	N	Weight of depreciation/impairment expense
2016	72	51.59%	292	86.66%
2015	72	57.51%	299	84.03%
2014	76	60.68%	304	85.26%
2013	77	65.59%	303	89.34%
2012	77	58.36%	303	90.23%
2011	78	55.07%	297	85.29%
2010	78	60.20%	287	80.68%
2009	79	60.27%	-	-
2008	78	46.45%	-	-
2007	78	45.52%	-	-
2006	68	49.64%	-	-
2005	63	43.74%	-	-
2004	61	42.27%	-	-
2003	59	47.45%	-	-
2002	49	38.59%	-	-
2001	44	38.88%	-	-
2000	39	32.28%	-	-
Total	**1,148**	**51.80%**	**2,085**	**85.97%**

Even if the effects of the crisis faded further in the period after 2010, companies listed on the regulated market are switching to IFRS, which means tighter depreciation rules for the fixed assets, which leads to a high weight of depreciation costs/depreciation of tangible and intangible assets.

3.2.4 Financial auditor observations concerning the fixed asset depreciation/impairment

For listed companies – classified as public interest entities – the financial statements must be accompanied by the report of a financial auditor confirming the degree of compliance with the relevant financial reporting and accounting standards. In situations where the auditors did not have sufficient audit evidence to formulate their opinion or did identify elements that may affect the quality of

the financial statements, the opinion may be modified. Also, some other elements, the degree of significance of which does not justify a modified opinion, can be presented in an emphasis of matter paragraph. The auditor should justify the modified opinion and the emphasis of matter paragraph. In the audit reports available for the Romanian listed companies, we have identified the justifications and observations regarding the depreciation of fixed assets. For companies listed on the regulated market, we only had auditing reports available since 2007, while for companies quoted on AeRo, the period remains the same as in the previous analyzes (2010-2016).

Thus, on the regulated market we have 736 audit available reports (for the period 2007-2016), of which 213 (28.94%) with modified opinion. From these modified opinions, 35 contain (among others) explanations on the depreciation of fixed assets, 13 provide explanations about impairment, and 60 indicate revaluation as a source of non-compliance. On AeRo, out of the 1,725 available reports, 416 are modified (24.15%) and among the justifications, the depreciation is present 20 times, the impairment 30 times, and the revaluation 75 times.

In the case of the depreciation, the main explanations refer to: the use of tax rules instead of strictly accounting rules, (non)depreciation of fixed assets put into conservation, unjustified discontinuation of depreciation. The observations regarding the impairment of fixed assets refer to: the non-compliace or non-convincing determination of the recoverable amount, the non-recording of the impairment, the inappropriate accounting of the impairment, the use of inappropriate methods for determining the fair value (in the case of negative revaluations), the failure to take into account clear indications of impairment (such as significant losses, insolvency and other business continuity threats) that would impose impairment tests.

4. CONCLUSIONS

The purpose of our study was to analyze the evolution of accounting and tax rules on depreciation/impairment of tangible and intangible assets, highlighting several features for the companies listed on the Romanian financial market.

The findings on the evolution of regulations are clear: after a period when accounting and tax rules were the same, the influence of international standards led to a *de jure* separation of the accounting and tax rules on the depreciation/ impairment of fixed assets. In both series of rules, the same depreciation methods are allowed, but the depreciable amount and useful lifetimes may differ significantly depending on the option of each company. However, our hypothesis is that many Romanian companies - especially when they are not required to audit their financial statements - opt for the tax accepted solution, as to avoid keeping two distinct records.

BSE-listed companies report significant net fixed asset weights: around 50% on the regulated market (downward trend) and about 60% on AeRo. These

weights show the importance and impact of options for further valuation, depreciation and impairment of these assets. Indeed, the share of depreciation costs (depreciation +/- impairment adjustments) in EBITDA is extremely high, even after the normalization of outliers: more than 50% on the regulated market (with a trend of growth and influenced by the financial crisis and the transition to IFRS) and over 80 % on AeRo.

Regarding the depreciation method used, the overwhelming majority of the sample reports the straight-line method, and some companies use the depreciation on the product unit. In the case of applying the RAS, we find the accelerated method reported, but this disappears with the transition to IFRS for listed companies on the regulated market. The diminishing balance method is very little used.

Subsequent measurement of property, plant and equipment is largely based on the fair value model, even if this model is increasingly used only for buildings and/or land. We can put these options at the expense of massive inflation in the 1990s and early 2000s but, especially lately, on the taxation of buildings in terms of local taxes.

Because listed companies are audited, we could have access to audit reports for many of the entities in the sample. In the case of modified opinions (up to 30% on the regulated market and somewhere up to 24% on AeRo), the related justifications often refer to fixed assets: depreciation, impairment or revaluation. The most common such observations are the absence of the impairment tests, the approximate accounting for impairment, and the use of inappropriate methods for determining the fair value.

The limits of the study consist, first of all, in its strictly descriptive character, but also in the absence of correlation between the analyzed variables and the specific financial indicators for listed companies. Also, comparison with situations in other states would be extremely useful. These limits can be found in so many directions of future research.

References

1) Bunget, O. C., Dumitrescu, A. C. (2012). Studiu asupra relației dintre opinia de audit și respectarea principiilor contabile. *Audit Financiar*, 10(1), pp. 6-11.
2) Duțulescu, S. (2015). Cercetare privind tratamentul contabil al imobilizărilor corporale. *Audit financiar*, 13(9), pp. 48-57.
3) Huian, C. M., Mironiuc, M. and Chiriac, M. (2018). Study on the association between earnings management and value relevance based on the reporting method used for operating cash flows. *Audit Financiar*, 16(1), pp. 101-110.
4) Istrate, C. (2012). Impact of IFRS on the accounting and tax rules for fixed tangible assets. *Journal of Accounting and Management Information Systems*, 11(2), pp. 243-263.

5) Lazăr, S. (2014). Determinants of the Variability of Corporate Effective Tax Rates. Evidence from the Romanian Listed Companies. *Emerging Markets, Finance and Trade,* 50(4), pp. 113-131.
6) OMFP 94/2001 – Ordinul ministrului finanțelor publice 94/2001 pentru aprobarea Reglementărilor contabile armonizate cu Directiva a IV-a a Comunităților Economice Europene și cu Standardele Internaționale de Contabilitate (In M. Of. 85/20.02.2001).
7) Ristea, M. (1998). *Contabilitatea între fiscal și gestionar*. București: Tribuna Economică.
8) Spengel, C., Lazăr, S., Evers, L. and Zinn, B. (2012). Reduction of the Effective Corporate Tax Burden in Romania from 1992 to 2012 and Romania's Current Ranking among the Central and Eastern European Member States. *Post-Communist Economies*, 4, pp. 477-502.
9) Toma, C. and Robu, I. B. (2014). Study on the role of financial auditing to ensure the conservatism in financial reporting. *Audit Financiar*, 12(9), pp. 3-16.

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PARADIGM SHIFT IN AUDITING THE EUROPEAN PUBLIC INTEREST ENTITIES' ANNUAL REPORTS

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Abstract
Ones of the most dynamic features of the capital markets and the audit profession are financial reporting and auditing. In the last twenty years, many and fundamental changes impacted the content, format, and reliability of business information that is exchanged in the capital markets. For a long time, the public interest entities (PIEs) were associated with listed companies. The auditors were seen as confidence providers for the information published by PIEs. At the same times, a fall in confidence in the integrity of the financial market was caused by a number of financial reporting and auditing failures. For these reasons, the role and responsibilities of auditors in the recent financial crisis are still under the scrutiny. As a consequence, in European Union have been adopted new rules on statutory audit and this adoption generated a revised definition of the public interest entities (PIEs) in most European countries. In this context, the purpose of this study is to identify the changes and the challenges for the audit profession in Europe. Because the primary objective of the European reform on the statutory audit for PIEs is to increase the quality of audits, we will also analyze the direct and indirect implications of new rules on the public oversight of statutory auditors and audit firms in EU member states. For this purpose, we identified the current state of affairs regarding the organization of public oversight of statutory auditors and audit firms in European countries and the characteristics of these activities.
Keywords: *statutory audit, public interest entities, audit quality, public oversight of audit profession.*
JEL Classification: M41, M42, M48

1. INTRODUCTORY REMARKS

Our research tries to prove that the role of the statutory audit cannot be separated from the role of financial and non-financial information, which is likely to vary across institutional settings, stakeholder categories and types of companies.

For a long time, the public interest entities (PIEs) were associated with listed companies. A few years ago, the Directives 2013/34/EU on accounting and 2014/56/EU on statutory audits stated a new definition of Public Interest Entities as follows:

"(a) entities governed by the law of a Member State whose transferable securities are admitted to trading on a regulated market of any Member State;

(b) credit institutions;

(c) insurance undertakings;

(d) entities designated by the Member States as public-interest entities, for instance undertakings that are of significant public relevance because of the nature of their business, their size or the number of their employees."

For (a), (b) and (c), there are a few references to the specific European Directives.

Not only these EU Directive have impacted the audit rules, but the Directive 2014/95/EU on Non-financial and Diversity Information (EU, 2014) still influence the engagement of statutory auditor.

Over the times, the auditors were seen as confidence providers for the information published by PIEs. In the last decades, all companies (PIEs or not) intend to adopt a future-oriented business reporting and a new assurance model imposed by the factors as the shift from the industrial age to the knowledge age; advances in technology, globalization, and market reactions to lack of transparency; and new social structures (AICPA Assurance Services Executive Committee, 2008).

In the past, most external reporting tended to be compliance-oriented on historical financial statements. Nowadays, many market driven initiatives around the world are working to support and promote new formats and contents of the corporate reports.

The debate about PIEs and audit of PIEs reports cannot be made outside of the discussion about Integrated Reporting. Moreover, from different regions of the world and from different sectors came initiatives that promote practicing of the "integrated thinking" in corporate reporting (Busco *et al.*, 2013; Frías-Aceituno, Rodríguez-Ariza and Garcia-Sánchez, 2014; IIRC, 2013).

The form and content of corporate reports, especially the PIEs reports, generate new challenges for the statutory auditors which must accomplish many tasks than a few years ago. A study realized by Chersan (2017) shows that, in European Union, the most companies which report according to the requirements issued by the International Integrated Reporting Council belongs to the "large companies" category (meaning also PIEs).

Current audit standards are risk-based models, but recent research identified elements of an interpretive assurance model which concentrate on providing assurance on the interpretation and analysis of information included in an integrated report rather than on underlying data (Maroun, 2018).

2. LITERATURE REVIEW

The Directive 2014/95/EU on Non-financial and Diversity Information (EC, 2014a) introduces additional non-financial information (NFI) disclosure requirements for large public interest entities (PIEs) with more than 500 employees. That means about 6,000 large companies and groups across the EU. These entities are required to provide information on, at least: "environmental

matters; social and employee-related aspects; respect for human rights; and anti-corruption and bribery issues". The Member States have been obliged to ensure the compliance with the Directive starting with 2017. These requirements are the results of important changes produced in the business reporting process in the last decade.

To assist companies in the presentation of high-quality non-financial information and to facilitate comparability, the European Commission published, in 2017, Guidelines on non-financial reporting (methodology for reporting non-financial information) (2017/C 215/01) (EC, 2017). According to the proposed methodology, the non-financial statements should: disclose material; be fair, balanced, and understandable; be comprehensive but concise; be strategic and forward looking; be stakeholder orientated; and be consistent and coherent.

As a consequence, we can anticipate an enrichment of the content of reports produced and a standardization of practice. However, it is not sure at all that a quantitative increase would be accompanied by a qualitative increase.

Over the years, the literature focused on the quality of non-financial information, voluntary or mandatory disclosed. According to Wang and Li (2016), the quality of the NFI is positively correlated with the equity value of the company. The analysis conducted by Carroll and Shabana (2010) shows that adopting a proactive approach to non-financial issues generates confidence among investors. An empirical study conducted by Lock and Seele (2016) demonstrates that regulation is not always associated with improvement in the quality of non-financial information. Similar results have been obtained previously by Deegan (2002) and Adams (2004), who underline that only regulation could improve the quality of non-financial information disclosure.

The precursors of the newest models of corporate reporting (such as Integrated Reports) are Corporate Social Responsibility (CSR) reports. These new models have abandoned the classical approach, which separates financial information from non-financial aspects, in favor of integrated models that contain both types of information in order to provide stakeholders with summarized and more connected data on the various aspects of business performance (Maas, Schalteggerand and Crutzen, 2016).

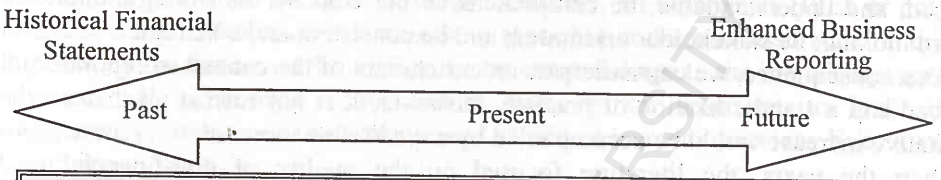
A recent study (Venturelli *et al.*, 2017) shows that an information gap still exist in the corporate reports and the implementation of the Directive 2014/95/EU should help to fill it in the coming years. On the other hand, the paper confirms the role of regulation in improving the quality of disclosure of non-financial information.

Although the Directive does not considered the possibility of regulating the presentation of integrated reporting (IR), there are European companies that have begun to combine all their reports into a single document that is an integrated report (Chersan, 2017).

No matter what model is used to disclose NFI, the main criticism that has been directed at NFI is the stakeholders' lack of trust in the information disclosed. To overcome this issue, some studies emphasize assurance procedures in sustainability reporting in order to grant credibility to non-financial disclosure (Moroney, Windsor and Aw, 2012).

Table 1 gives a view of the indicators that have characterized the business reporting and the indicators that are used in the present or that can be used in the future for an enhanced business reporting.

Table 1. Business Reporting: A Changing Dynamic



Lagging indicators…	Leading indicators…
• One size fits all	• Tied to company-specific mission, vision, and values
• Ignores nonfinancial measures	• Focuses on factors critical to success
• Reports results of past decisions	• Moves decision criteria to forefront
• Periodic	• On-demand
• Historical	• Real-time/future
• Cost-basis	• Fair value basis
• Financial only	• Comprehensive
• Statements	• Custom reports and analysis
• Backward-looking	• Forward-looking

Source: (AICPA Assurance Services Executive Committee, 2008, p. 6)

The prediction of AICPA was good, because, in the last ten years, can be observed that not only in Europe but across the world the corporate reporting process has changed under the pressure of the market.

Changing the type of corporate reports changes the type and the level of assurance that can be provided for these reports. The level of assurance provided for the corporate reports is affected by the following factors: subject matter, criteria, work effort, quantity of evidence and quality of evidence. The results of a previous research (Hasan *et al.*, 2005) show that the subject matter (for Big audit firms) and the work effort (for non-Big audit firms) are the most important determinants of the level of assurance of corporate reports.

Regarding the assurance of the NFI the Directive 2014/95/EU states that the auditor must verify just the existence of the NFI in the companies' report.

For the purpose of this research, I performed an analysis of the European legislation on the non-financial and diversity information, statutory audit, the audit oversight system, and audit quality. Then, I analyzed the information available on the sites of accounting and auditing professional organizations such as Accountancy Europe, International Federation of Accountants on the topic of EU audit reform in order to obtain an understanding of what are the challenges for EU members in the context of the audit reform imposed by the new directives and regulation. Also, for studying the evolution in the process of implementation at European level of these new rules, I included in the analysis the studies performed by others authors on the topic of NFI and new requirements for PIEs reports.

3. TRANSPOSITION OF THE EU DIRECTIVE ON NON-FINANCIAL AND DIVERSITY INFORMATION IN MEMBER STATES – WHERE ARE WE NOW?

At the moment, independent assurance on NFI is not mandatory and not mature in the majority of European countries. This situation can be explained not only by the different assurance standards applicable but by the different level of requirements for NFI resulted from the transposition of the Directive 2014/95/EU in national legislation of the Member States.

There are big differences between countries regarding the law implementing the Directive in all the 28 Member States as well as two countries from European Economic Area (Iceland and Norway). An exhaustive analysis of how Member States have implemented the EU Directive on Non-financial and Diversity Information was realized by three important international organizations: Global Reporting Initiative (GRI), CSR Europe and Accountancy Europe (former Fédération des Experts-comptables Européens – FEE).

The criteria used by these organizations to appreciate the accuracy of Directive transposition are represented by definition of a large undertaking; definition of public interest entities; report topics and content; reporting framework, disclosure format; auditor's involvement; non-compliance penalties; safe harbour principle; and diversity reporting required (GRI & CSR Europe, 2017). Figure 1 gives a view on the results of implementation process.

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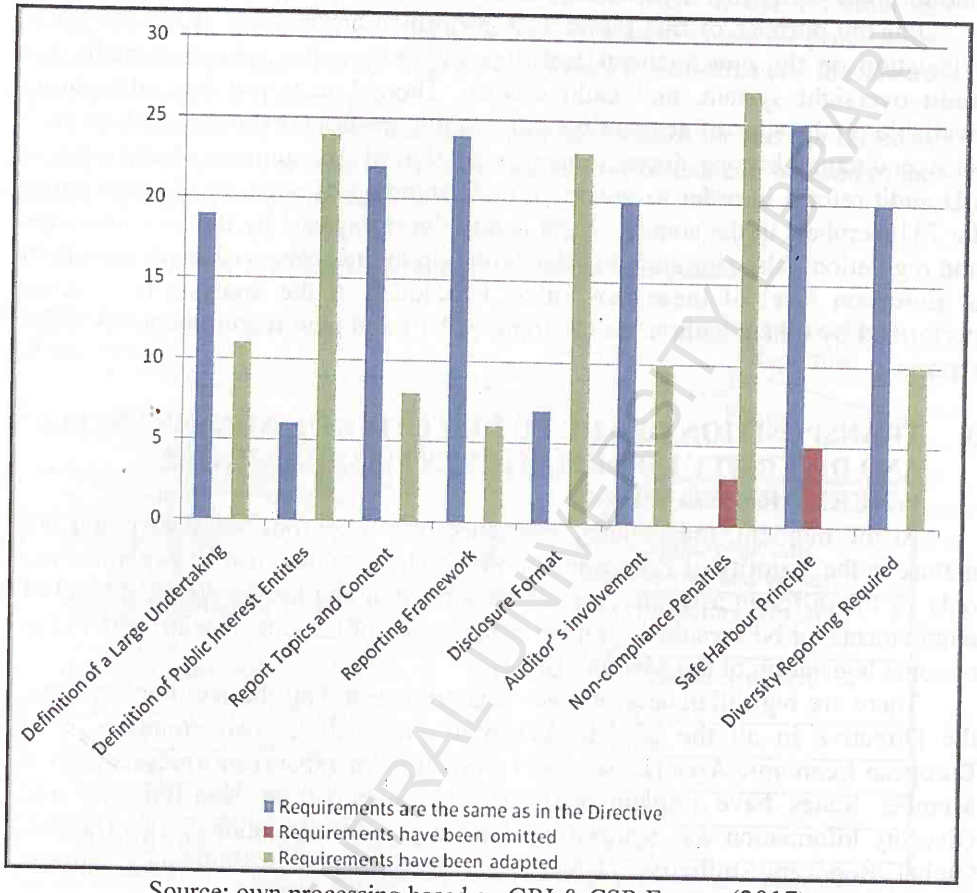
Figure 1. Number of EU Member States by type of requirements adopted



Source: own processing based on GRI & CSR Europe (2017)

The majority of the European countries adapted the requirements on the non-compliance penalties (27), definition of PIEs (24) and disclosure format (23). Can be noticed that no one countries have been adopted the Directive requirements on the non-compliance penalties and in three countries have been omitted.

The highest level of requirements acceptance can be noticed for safe harbour principle (25), reporting framework (24) and report topics and content (22). Similarity in the acceptance level is in the case of auditor's involvement and the requirements for diversity reporting (20).

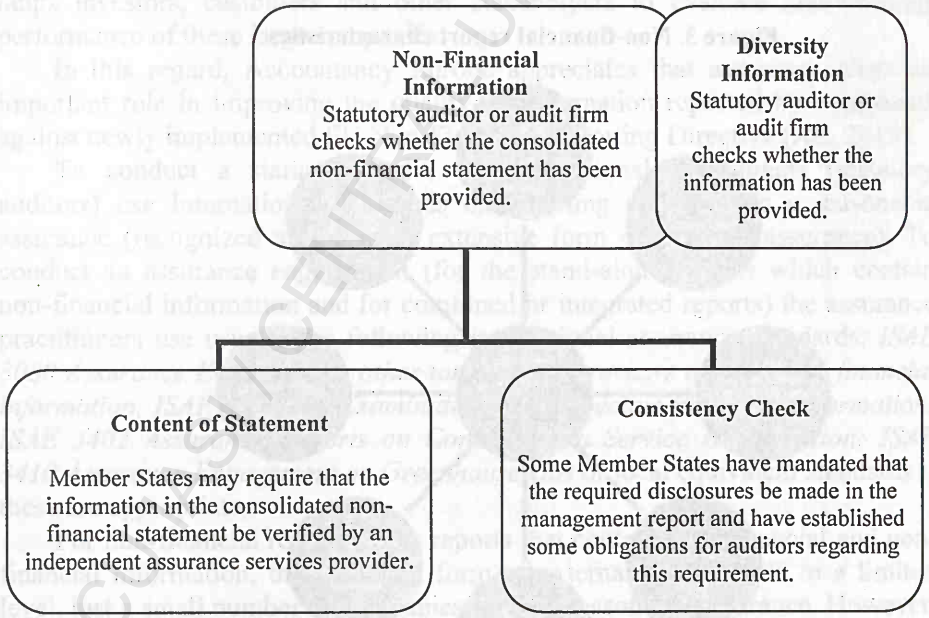
Despite these differences in the adoption of Directive requirements, the Member States have the obligation to publish in an appropriate form a report that must contain the following items: (1) a description of the business model; (2) a description of the policies employed in relation to the issues in question,

confirmation of the application of due diligence and a summary of the results thereby obtained; (3) a description of the main risks to and adverse impacts made on the company's operations, and of how these have been managed; and (4) the key performance indicators.

Although the Directive does not propose a model for NFI statements, the agreed international references that can be used by companies are multiple: United Nations Global Compact, the UN Guiding Principles on Business and Human Rights, the OECD Guidelines for Multinational Enterprises, ISO 26000, the tripartite declaration of the International Labour Organization on principles for multinational companies and social policy, the Global Reporting Initiative, and EU Eco-Management and Audit Scheme (EMAS).

The multitude of references generates the difficulty in the assurance of the reports that contain this very different information. Regarding this last issue, one of requirements of the Directive refers to auditor's involvement. There are differences on the involvement of the auditors on the two main aspects regulate by the Directive: NFI and diversity information such as can be observed in Figure 2.

Figure 2. Auditor's involvement in non-financial and diversity reporting requirements


Non-Financial Information
Statutory auditor or audit firm checks whether the consolidated non-financial statement has been provided.
Diversity Information
Statutory auditor or audit firm checks whether the information has been provided.
Content of Statement
Member States may require that the information in the consolidated non-financial statement be verified by an independent assurance services provider.
Consistency Check
Some Member States have mandated that the required disclosures be made in the management report and have established some obligations for auditors regarding this requirement.

Source: own processing based on GRI & CSR Europe (2017)

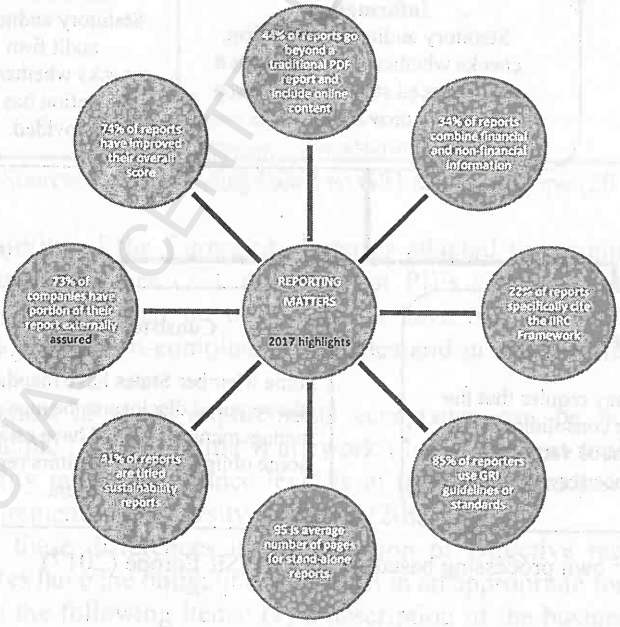
Consistency check for non-financial reporting requirements supposes that the statutory auditor or audit firm to:

1. Express an opinion on:
   - whether the management report is consistent with the financial statements for the same financial year, and
   - whether the management report has been prepared in accordance with the applicable legal requirements;
2. State whether, in the light of the evidences obtained in the course of the audit, he or she has identified material misstatements in the management report; if he did identify such misstatements, the auditor must give an indication of their nature.

Some others interesting findings come from World Business Council for Sustainable Development (WBCSD) 2017 Report. Thus, the 2017 edition of *Reporting matters* reveals that the non-financial reporting landscape is changing at an increasing rate, across the voluntary and regulatory reporting space and across the globe (WBCSD, 2017). The results identified after examination of 157 sustainability reports from WBCSD member companies shows there is clear progress towards an important change in reporting.

Figure 3 shows a few findings in a concise manner, but the report contains many others interesting information concerning the assurance of the analyzed reports.

Figure 3. Non-financial report characteristics


44% of reports go beyond a traditional PDF report and include online content
74% of reports have improved their overall score
44% of reports combine financial and non-financial information
73% of companies have portion of their report externally assured
REPORTING MATTERS
2017 highlights
22% of reports specifically cite the IIRC Framework
41% of reports are titled sustainability reports
85% of reporters use GRI guidelines or standards
95 is average number of pages for stand-alone reports

Source: own processing based on WBCSD (2017)

The 2017 edition of *Reporting matters* shows that 90% of reports have some form of assurance on their sustainability disclosures, but only 17% of companies don't engage external assurance providers, using their internal audit function, for assurance purposes. The rest on 10% of companies don't use any assurance provision at all.

With recent evolution of reporting, the question is if the assurance providers can deliver higher value services with more efficiency and effectiveness.

4. WHAT IS NEW IN THE ASSURANCE OF ANNUAL REPORTS?

Any type of organization can be audited against a set of standards. When auditors are auditing, they collect evidence, not promises. The audit evidence forms the basis of the audit report.

For a long time, the assurance of annual reports was a financial auditors matter. In the last decades, the social and environmental information became a part of annual reports, so the assurance of these reports have been exceeded the area of professional accountants.

The Directive 2014/95/EU on Non-financial and Diversity Information (EC, 2014a) marks a major shift in understanding and managing the challenges faced by businesses in the recent years. Disclosing information on the way the large public interest entities operate and manage social and environmental challenges helps investors, customers and other stakeholders to evaluate non-financial performance of these large companies.

In this regard, Accountancy Europe appreciates that assurance plays an important role in improving the quality of information reported by companies against newly implemented EU Non-Financial Reporting Directive (AE, 2018).

To conduct a statutory audit, the professional accountants (statutory auditors) use International Standards on Auditing and provide a reasonable assurance (recognized as the most extensive form of external assurance). To conduct an assurance engagement (for the stand-alone reports which contain non-financial information and for combined or integrated reports) the assurance practitioners use usually the following international assurance standards: *ISAE 3000 Assurance Engagements other tan audits or reviews of historical financial information; ISAE 3400 The Examination of Prospective Financial Information; ISAE 3402 Assurance Reports on Controls at a Service Organization; ISAE 3410 Assurance Engagement on Greenhouse Gas* or local equivalent standards if these are appropriate.

For non-financial reports or for reports that contain both financial and non-financial information, the dominant form of external assurance is to a limited level, just a small number of companies seeking reasonable assurance. However, the proportion of companies using reasonable assurance has increased in the last five years, suggesting a growing preference for more comprehensive validation. There are companies that use a combination of reasonable and limited assurance.

In this case, the companies that confirmed they use external assurance represent a very small percentage and don't disclose any details about the level of assurance (WBCSD, 2017).

On this topic, Accountancy Europe has selected the data collected, in 2017, by World Business Council for Sustainable Development and has provided the challenges in the assurance practices of sustainability information, including those published by the companies based in Europe (Table 2).

Table 2. Trends in the assurance of sustainability information

TRENDS IN ASSURANCE	SOLUTIONS
75% of companies who obtained external assurance did so at a limited level whereas 25% did so at a reasonable level on at least some key indicators (companies based in Europe followed this trend).	Further guidance is needed on how to apply ISAE 3000 and how to deal with emerging practice.
	There is a need to inform stakeholders that different types of data can be subject to different levels of assurance.
	The explanation of the scope in the assurance report must be clear enough to ensure that the report users understand which assurance is provided on what.
Companies with less mature reporting practices may start with assurance for internal purposes only.	A combination or convergence of professional standards dealing with financial audit and with NFI assurance would be very useful.
Engage the assurance practitioner to perform an engagement on a limited number of KPIs.	Guidance is needed to clarify the different types of boundaries that could be applied, and to provide examples of KPIs and their definitions that would be eligible for assurance.
10% of companies who obtained external assurance had a combination of limited and reasonable assurance on different parts of the same report (including 19%of companies based in Europe).	Using the terminology 'audit and review' instead of 'reasonable and limited assurance reports' would pave the way for a more integrated assurance statement.
	The assurance practitioner may need additional training or external expert insights on specific subject matters.

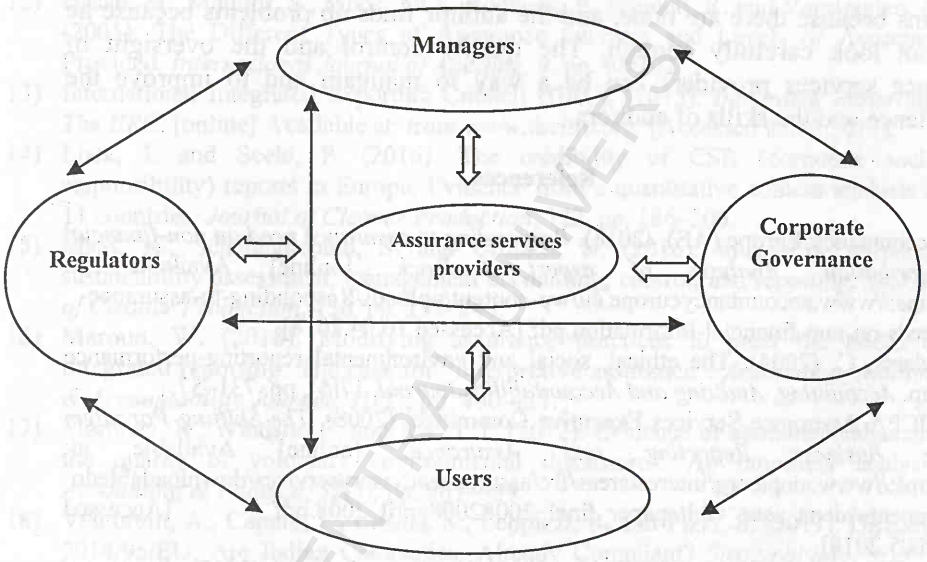
Source: own processing based on AE (2018)

Subjects related to audit and assurance services are audit oversight and audit quality. For statutory audits there are rules imposed by the International Standards on Auditing and International Standards on Quality Control.

Following the example of USA that create, in 2002, the Public Company Accounting Oversight Board, in Europe, has been adopted new significant legislation that includes provisions which impacted the organisation of public oversight of statutory auditors and audit firms in EU member states. The new rules establish the key activities of every national public oversight body applicable on PIEs and non-PIEs: standard setting and endorsement of standard; quality assurance system; and disciplinary measures and sanctions.

Figure 4 presents the more important interactions with regard to assurance services quality.

Figure 4. Interactions between assurance services providers and stakeholders



There are a number of environmental and/or contextual factors, such as law, regulation and corporate governance, which can impact the nature and the quality of financial and non-financial reporting and, as a consequence, the quality of assurance services. In the case of joint-audit, these interactions are more complex and ask more attention and diligence from the professional organization. Anyway, all these rules and factor should conduct to a high quality statutory audit or assurance services.

5. CONCLUSIONS

Companies should better connect financial and non-financial information to improve the robustness and reliability of the reported information. For this purpose, the reporting standard setters should establish good principles and

guidance for companies to refer to as they implement systems to process NFI. Because there are a lot of applicable frameworks, o solution to improve the reports' quality is the alignment of existing reporting frameworks, their purpose and leading principles. Regarding the assurance services, further guidance is needed on the form of the assurance report and on how to deal with forward looking subject matters.

The main challenges for annual reports are their content and their credibility. Is a management responsibility to avoid an artificial and idealized representation which is disconnected from reality to some extent. On the other hand, is an auditor/assurer responsibility to check if the management offers a transparent report that shows a clear and fair image of the organization. The quality of auditor conclusion depends on his competence: the auditor finds no problems because there are none, and the auditor finds no problems because he does not look carefully enough. The quality control and the oversight of assurance services providers can be a way to maintain and to improve the competence and the skills of auditors.

References

1) Accountancy Europe (AE), (2018). *Responding to assurance need on non-financial information. Analysis of expert feedback.* [online] Available at: https://www.accountancyeurope.eu/wp-content/uploads/Responding-to-assurance-needs-on-non-financial-information.pdf [Accessed 10.04.2018].
2) Adams, C. (2004). The ethical, social and environmental reporting-performance gap. *Accounting, Auditing and Accountability Journal,* 17(5), pp. 731–57.
3) AICPA Assurance Services Executive Committee, (2008). *The Shifting Paradigm in Business Reporting and Assurance.* [online] Available at: https://www.aicpa.org/interestareas/frc/assuranceadvisoryservices/downloadabledocuments/aicpa_asec_whitepaper_final_20082008april_2008.pdf [Accessed 08.05.2018].
4) Busco, C., Frigo, M.L., Riccaboni, A. and Quattrone, P. (eds.) (2013). *Integrated Reporting. Concepts and Cases That Redefine Corporate Accountability*, Springer.
5) Carroll, A.B. and Shabana, K.M. (2010). The business case for corporate social responsibility: A review of concepts, research and practice. *International Journal of Management Reviews.* 12(2), pp. 85–105.
6) Chersan, I.C. (2017). Integrated reporting in Europe – from voluntary to mandatory?. *Journal of Public Administration, Finance and Law*, Special Issue 3, pp.19-30.
7) Deegan, C. (2002). Introduction: The legitimizing effect of social and environmental disclosures. A theoretical foundation. *Accounting, Auditing and Accountability Journal,* 15(3), pp. 282–311.
8) European Union (EU), (2014). Directive 2014/95/UE of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/UE as regards disclosure of non-financial and diversity information by certain large undertakings and groups.

9) European Commission (EC), (2017). *Communication from the Commission Guidelines on non-financial reporting (methodology for reporting nonfinancial information)* (2017/c 215/01). [online] Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52017XC0705(01)&from=EN [Accessed 11.10.2017].
10) Frías-Aceituno, J.V., Rodríguez-Ariza, L. and Garcia-Sánchez, I.M. (2014). Explanatory factors of integrated sustainability and financial reporting. *Business Strategy and the Environment*, 23(1), pp. 56-72.
11) GRI & CSR Europe, (2017). *Member State Implementation of Directive 2014/95/EU. A comprehensive overview of how Member States are implementing the EU Directive on Non-financial and Diversity Information.* [online] Available at: https://www.globalreporting.org/resourcelibrary/NFRpublication%20online_version.pdf [Accessed 15.12.2017].
12) Hasan, M., Maijoor, S., Mock, Th.J., Roebuck, P., Simnett, R. and Vanstraelen, A. (2005). The Different Types of Assurance Services and Levels of Assurance Provided. *International Journal of Auditing,* 9, pp. 91-102.
13) International Integrated Reporting Council (IIRC), (2013). *Integrated Reporting: The IIRC.* [online] Available at: from www.theiirc.org/ [Accessed 22.03.2017].
14) Lock, I. and Seele, P. (2016). The credibility of CSR (corporate social responsibility) reports in Europe. Evidence from a quantitative content analysis in 11 countries. *Journal of Cleaner Production*, 122, pp. 186–200.
15) Maas, K., Schalteggerand, S. and Crutzen, N. (2016). Integrating corporate sustainability assessment, management accounting, control, and reporting. *Journal of Cleaner Production*, 136, pp. 237–248.
16) Maroun, W. (2018). Modifying assurance practices to meet the needs of integrated reporting: The case for "interpretive assurance". *Accounting, Auditing & Accountability Journal*, 31(2), pp. 400-427.
17) Moroney, R., Windsor, C. and Aw, Y.T. (2012). Evidence of assurance enhancing the quality of voluntary environmental disclosures: An empirical analysis. *Accounting & Finance*, *52*(3), pp. 903–939.
18) Venturelli, A., Caputo, F., Cosma, S., Leopizzi, R. and Pizzi, S. (2017). Directive 2014/95/EU: Are Italian Companies, Already Compliant? *Sustainability*, 9,1395, pp. 1-19.
19) Wang, K.T. and Li, D. (2016). Market reactions to the first-time disclosure of corporate social responsibility reports: Evidence from China. *Journal of Business Ethics*, 138(4), pp. 661–682.
20) World Business Council for Sustainable Development (WBCSD), (2017). *Reporting matters. Striking a balance between disclosure and engagement.* [online] Available at: https://www.wbcsd.org/Projects/Reporting/Reporting-matters/Resources/Reporting-Matters-2017 [Accessed 01.02.2018].

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THE USE OF LEGALLY UNDEFINED CONCEPTS IN THE PRACTICE OF ROMANIAN TAX AUTHORITIES

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Abstract
The practice of tax authorities to motivate their administrative-tax acts by referring to the terms "carousel", "pipeline", "bucket", and "ghost" is contrary to the principle of legality, and attacks the essence of taxpayers' subjective rights when it comes to tax matters. This administrative practice is inconsistent and parallel to the binding jurisprudence of the Court of Justice of the European Union. Therefore, it is necessary to either normalize these concepts for reasons of legality, certainty, fiscal predictability, or to abandon them in administrative practice.
Keywords: *legal rules; tax fraud; carousel operations; tax concepts; jurisprudence.*
JEL Classification: K34

1. INTRODUCTION

On the basis of the administrative-tax act, which carries out additional taxation, the taxpayer should understand what type of anti-fiscal behavior he/she is being accused of and the legal norms of fiscal laws he/she has violated through his/her behavior.

Often, however, the motivation of the administrative-fiscal act is lapidary. This also because tax authorities use customized formulas, such as "pipeline operations", "carousel operations", "bidet operations" or "ghost operations". The problem is that these words: "carousel", "bucket", "ghost", "pipeline", although used in conjunction or individually, are marked as such and recognized by state bodies: tax inspectors or criminal prosecution bodies, although they do not have a legal definition.

2. FROM THEORY TO PRACTICE

According to art.11 par. (1) of the Fiscal Code: "When determining the amount of a tax, of a levy or mandatory social security contribution, tax authorities may not consider a transaction that has no economic purpose, adjusting its tax effects, or may redefine the form of a transaction / activity to reflect the economic content of the transaction/ activity. The tax authority is in fact required to give reasons for the tax decision issued as a result of the non-

consideration of a transaction or, as the case may be, as a result of the redefinition of the form of a transaction, by indicating the relevant elements in relation to the purpose and content of the transaction which is subject to the non-consideration/ redefinition, and all the means of evidence considered for that purpose".

This regulatory text allows the tax authority to redefine a transaction or activity that a taxpayer carries out or performs with a minimum obligation to motivate the change of optics and to indicate the evidence in question. In administrative-fiscal practice, the motivation is often lapidary, vague, speculative, and the evidence either does not exist or is not presented to the taxpayer. It should be noted that neither the principle of the right to defense in tax matters nor the specific jurisprudence resulting from the Ispas affair were received in the manner prescribed by the administrative practice, namely the Romanian judicial practice. In this context, the fiscal power is quasi-discretionary [1].

That is why the two tax and criminal procedures run in parallel [2], with the common denominator in the tax status.

As I have already pointed out, it is necessary to operate a necessary doctrinal distinction between legal tax evasion and unlawful tax evasion.

Apparently justified, because even the positive legislator through Law no. 241/2005 (Published in the Official Gazette no. 672 of 27 July 2005) is not conceptually rigorous, the fiscal body does not distinguish between tax evasion and tax fraud. However, the distinction is one established in the doctrinal plane. Tax evasion (*tax avoidance*) is essentially the set of legitimate means by which taxpayers evade tax revenues. The legitimacy of the evasion makes the operations used to remain in the sphere of tax law, the taxpayer operating with the most inspired tax legal rules in the attempt to secure subjective rights, so that this "art of avoiding falling into the field of attraction of the tax law" (Jean-Claude Martinez *apud* Costaș, 2016a, p. 205.) does not meet the constitutive elements of a crime.

Instead, fiscal fraud (*tax evasion* or *tax fraud*) is the set of committing or omitting acts or facts to evade income from taxing. This time, the violation of the fiscal legal norms meets the constitutive elements of an offense which under Romanian positive law has an improper name - a crime of tax evasion (Puț, 2017, p. 742).

3. CAROUSEL TAX FRAUD

Practice has detained several forms of tax fraud, but perhaps the most used is the carousel fraud, which can be fraud "on entry" or "at exit". The most common of these forms is classic carousel fraud or "on entry" fraud, which is used precisely because it uses simple, rudimentary methods that can be activated even by less-initiated individuals in the VAT-specific mechanism.

As a rule, a stereotype system is put into operation. The economic operator in the home country issues an invoice without VAT, since it carries out an intra-Community supply that falls under the VAT exempt transactions and the economic operator in the country of destination applies the reverse charge for this operation for the same reason that it makes an intra-Community acquisition.

After the intra-community acquisition, the economic operator disappears without registering, declaring, and paing the collected VAT for subsequent deliveries made on its domestic market. In view of this fact, because the company making the intra-Community acquisition consecutively carries out an internal delivery to other legal subjects in respect of which it no longer fulfills the VAT tax obligations, this company was referred to in the practice of tax authorities as "bucket" company.

The intermediary company - the "bucket" company is also referred to as "ghost" company and the "missing link" in intra-community trade, precisely considering its role in the chain of transactions. In order to dissipate the reality, in the supply chain are introduced also other link companies that have the role of enhancing the apparent legality of operations.

Although it is not mandatory for the purchased goods to return to the intra-Community economic operator - the first seller, with a corresponding "adjustment" of the corresponding price, sometimes the carousel mechanism closes. Sometimes, however, another commercial chain overlaps the supply chain to make it more difficult to track the route of the goods.

In principle, the lawful culpable company, the fraud company is the intra-community purchaser, and the other companies in the supply chain not being legally responsible. However, if it is proved by means of proof that one of the other companies that had a fair tax behavior knew or ought to have known that it is part of a fraudulent mechanism, its right of deduction will be denied. But if the company that made the acquisition from the "bucket" company participated in a VAT fraud unintentionally, it has the right to deduct and, implicitly, to offset or reimburse the VAT for the upstream operations. It is necessary for each company in the chain of transactions for intra-Community operations to be analyzed by tax inspectors distinctly, to abolish the presumption of fraud and to prove possible involvement in the fraudulent mechanism by means of proof.

In tax practice, things are happening differently, aspect confirmed by one of the recent examples I have met.

4. PRACTICAL EXAMPLE OF MOTIVATING AN EXORBITANT TAX DECISION BY REFERENCE TO LEGALLY NON-EXISTENT TAX CONCEPTS

By a decision issued by the Administration for Medium Contributors established at Cluj County level on 02/13/2018 regarding the situation of tax liabilities for the period 07/01/2011 – 06/30/2013 regarding the corporation tax,

respectively 09/01/2011 – 06/30/2013 in with regard to value added tax, tax liabilities amounting to approximately EUR 3 million were imposed on company M.

The reasons underlying this administrative act were bizarre from a legal standpoint. It was noted that company M. was part of a fraudulent carousel type mechanism. The tax inspection team then annulled the right to deduct VAT of M company and excluded from the deductible expenses category the expenses that were eligible for deductibility in the field of corporation tax on the ground that its trading partners would have inappropriate fiscal behavior. The reasons given in the fiscal inspection report considerations refer to the behavior of the company's suppliers: lack of accounting, lack of declaration of deliveries, inactivity, non-payment of VAT, representation by persons not included in the articles of association, lack of employees, etc.

According to the same reasoning, the company concerned by the tax inspection together with the co-operating companies is part of a chain of companies on whose behalf invoices were drawn up which do not contain actual transactions, issued for the purpose of evasion of taxes and duties by "beneficiaries" and for the creation of undue tax advantages.

Unjustifiably that what triggered a legal tax liability was not company M's own behavior but the behavior of its contractual partners. What is reproached to compay M., however, is the fact that it acquired the living animals that were the object of contracts of the intermediary company, even though they could have bought them directly from the Hungarian society, the owner of the animals. Moreover, the evidence on which the conclusions of the tax inspectors should have been based is virtually non-existent and, if they exist, they were not made available to the party [3]. In the given context, there are inevitably two rhetorical questions: how can you depersonalize legal liability at the administrative level and how suddenly a fiscal optimization becomes tax fraud?

5. THE RELATIONSHIP BETWEEN THE PRACTICE OF TAX AUTHORITIES AND THE PRINCIPLES OF TAXATION

Although it was not decisive to include in the Fiscal Code the limitation of the refusal to deduct VAT and the unequivocal proof by legal means of proof of the involvement of the taxable person in tax fraud, however, from the perspective of administrative practice, the recognition of the right to deduct VAT by par. (8) of art. 297 of the Fiscal Code, recently introduced in the legal order, is a positive thing. The text reads as follows: "The competent tax authorities have the right to refuse deduction of VAT if, after administering the evidence provided by law, they can show beyond doubt that the taxable person knew or ought to have known that the the operation invoked to justify the right to deduct was involved in a VAT fraud which occurred upstream or downstream of the supply chain.

Basically, the whole mechanism imagined so far by tax inspectors [4] is invalidated with full rights, because, although paragraph (8) concerns only deduction of VAT, it affects the whole tax authorities' reasoning on the position of the taxable person who, involved in certain transactions, is complying with its own tax obligations.

In Romanian law, liability is a subjective one, meaning that the violation of the imperative legal norm must be done with guilt, in the form of intent or fault. Exceptionally, it is acceptable to employ an objective responsibility, independent of fault, when the law expressly establishes objective legal liability, such as liability for the act of another or liability for things in the regulation of the New Civil Code [5].

In practice, it appears that the Romanian tax authorities have acted with objective legal liability in the absence of a rule of law to expressly and unequivocally enshrine it in this matter. By virtue of this premise, they have acted in the tax inspections handled in recent years in a questionable, unfounded way.

In a universe in which the terms "carousel", "pipeline", "buffer", "bucket", even "ghost" do not have a legal definition in their juxtaposition with the various operations carried out by tax subjects, but are elements of most of the tax inspection reports, we ask ourselves whether this reality is compatible with a series of principles that can have legal, doctrinal or jurisprudential [6] sources and that act the positive tax system in Romania.

Clearly, the principle of legality is violated [7]. It does not just remain at the stage of principle, but it is taken over by a multitude of rules of fiscal or non-fiscal law. For example, the principle of legality is provided by art. 1, par. (5), art. 137 and art. 139 of the Romanian Constitution. In essence, legality in tax matters means ensuring the disciplinary conduct of socio-fiscal relations in accordance with the rules of law, but also that the taxes and fees that are paid to the state budget are established by laws or normative acts with legal force equal to that of the law [8].

Moreover, the legality implies that the notions and legal institutions applicable in this matter benefit from a definition from the legislator, and administrative normative acts are published in the Official Gazette of Romania in order to be opposed to individuals. How could these phrases used in tax inspections be opposed, unless they were provided in the legal norms of some normative acts (see Costaş, 2016b, pp. 22-28).

The principle of legal certainty, which is specific to the rule of law [9], means essentially that the tax law does not apply retroactively, that access to positive tax legislation is ensured, that the legislation is comprehensible and predictable, that the tax administration clearly defines its requirements and respect the commitments made and achieve the unitary interpretation of the law [10].

The certainty of taxation implies the development of clear legal rules that do not lead to arbitrary interpretations and the deadlines, modalities and amounts of payment to be precisely established for each payer so that they can understand their tax burden [11].

Finally, the predictability of taxation ensures the stability of taxes and mandatory contributions for a sufficient period of time, in which no changes are introduced to increase or introduce new taxes and mandatory contributions [12]. In these cases, however, the issue of predictability of administrative practice and its acclimatization with European jurisprudence is questionable.

6. RELEVANT HEADINGS IN THE JURISPRUDENCE OF THE EU COURT OF JUSTICE

6.1 Optigen and Axel Kittel jurisprudence

By the judgment in the three related British businesses *Optigen*, *Fulcrum Electronics* and *Bond House Systems* [13], the Court of Justice held that the right to deduct value added tax paid upstream by a taxable person for certain transactions cannot be affected by the fact that in the chain of supplies or services of which those transactions are involved, there is a previous or subsequent transaction which is vitiated by VAT fraud, which the taxable person did not know or could not know.

This is one of the benchmarks provided by the EU Court of Justice in assessing the situation of the legal person involved in fraudulent operations without knowing it.

Moreover, in par. 46 of the same judgment, the Court notes that the obligation on the tax authorities to take into account, in order to determine whether a given transaction constitutes a supply of goods or a supply of services by a taxable person acting as such and an economic activity, the intention of a trader other than the taxable person in question involved in the same chain of supplies/ services and/ or the possible fraudulent nature of the chain transaction which the taxable person did not know and could not know would be *a fortiori* contrary to those objectives.

In essence, the right to deduct value added tax paid upstream by a taxable person for certain transactions cannot be affected by the fact that there is a previous or subsequent fraudulent transaction in the chain of supplies or services of which those transactions are involved the taxable person did not know or could not know of.

In the Belgian business of *Axel Kittel* and *Recolta Recycling* [14], the Court continues the line of thought already outlined in the *Optigen* affair. The European Court states in the final part of the judgment that the denial of the right to deduct can be justified only if the taxable person "knew or ought to have known" that it was involved in a fraudulent mechanism: "if it is found, having

regard to objective factors, that the supply is made to a taxable person who knew or ought to have known that by virtue of his acquisition he/she had participated in an operation relating to the fraudulent evasion of value added tax, it is for the national court to refuse that taxable person's right to deduction".

The principles affirmed and confirmed by the Court of Justice of the European Union in the *Optigen* and *Axel Kittel* decisions were the foundation of the so-called *innocent party theory* according to which any innocent party who did not know what happened upstream or downstream the supply chain of goods or services to which he/she was a party, is presumed to be an honest taxpayer who has the right to deduct his/her VAT paid. However, the right to deduct may be refused if, on the basis of objective evidence, the taxable person knew or ought to have been aware that he/she was participating in a fraudulent transaction.

6.2 PPUH affair

In the context in which PPUH Stehcemp [15] was denied the right to deduct the tax on the ground that the invoices related to the acquistitons had been issued by a non-existent operator, the Court ruled that: "The provisions of the Sixth Council Directive 77/388/EEC of May17th, 1977 on the harmonization of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment, as amended by Council Directive 2002/38/EC of May 7th, 2002, should be interpreted in to the effect that they preclude national legislation such as that at issue in the main proceedings, whereby to a taxable person is not recognized the right to deduct value added tax owed or paid in respect of goods which have been supplied to him/her on the ground that the invoice was issued by an operator to be considered, having regard to the criteria laid down by that regulation, as a non-existent operator and that it is impossible to establish the identity of the true supplier of the goods unless it is established, in relation to objective elements and without requiring from the taxable person to carry out verifications whose task it does not fall, that the taxable person knew or ought to have known that that supply was involved in a fraud of value added tax, a matter which the Court of First Instance has jurisdiction to examine".

In par. 52 of the judgment finds the Court's decision-making spring. Thus, the European Court of Justice states that: "Although such a taxable person may be required, if he/she has evidence to suspect that irregularities or fraud exist, to inquire about the operator from whom he/she intends to acquire goods or services in order to ensure its reliability, the tax administration may not, however, generally require the taxable person to verify that the issuer of the invoice relating to the goods and services for which the right to use the goods is claimed has the goods in question and was able to deliver them and whether it has fulfilled its obligations to declare and pay VAT in order to ensure that there are no irregularities or fraud at the level of the upstream operators or, secondly,

to have documents in that regard (see to that effect, Mahagében and Dávid decision, C 80/11 and C 142/11, EU: C:2012:373, paragraphs 60 and 61, Stroy trans decision, C 642/11, EU: C:2013:54, paragraph 49 and Jagiełło Order C 33/13, C:2014:184, paragraphs 38 and 39)".

6.3 Hardimpex affair

In the *Hardimpex* affair, there was the question of ensuring fiscal neutrality, in the sense of recognizing the right to deduct in the context of suspicious transactions and fraud committed upstream.

The Court ruled that art. 168 lett. (a) of Directive 2006/112/EC must be interpreted as precluding a tax authority of a Member State from refusing a taxpayer the right the right to deduct from the due VAT, the amount of VAT paid on the goods supplied to him on the ground that an earlier transaction in a chain of transactions was affected by an irregularity in the VAT rules or the taxpayer could be accused of failing to verify the origin of the goods in the invoice issued by his supplier without establishing with sufficient certainty that he knew or should have known that irregularity [16].

6.4 The Bonik EOOD affair

On the same block is made the decision in the Bonik affair [17]. According to the Court of Justice, art. 2, art. 9, art. 14, art. 62, art. 63, art. 167, art. 168 and art. 178 of Directive 2006/112/EC must be interpreted as precluding the possibility of refusing a taxable person, in circumstances such as those at issue in the main proceedings, the right to deduct value added tax relating to a supply of goods on the ground that, taking into account frauds or irregularities committed before or after that delivery, the subsequent delivery is deemed not to have been effected without having established, in relation to objective evidence, that that taxable person knew or ought to have known that the transaction which was invoked to justify the right to deduct, was involved in a VAT fraud which occurred upstream or downstream of the supply chain, which is a matter for the referring court to determine [18].

7. CONCLUSIONS

The practice of tax authorities to motivate their administrative-tax acts by referring to the terms "carousel", "pipeline", "bucket", and "ghost" is contrary to the principle of legality and attacks the essence of taxpayers' subjective rights in fiscal matter. This administrative practice is inconsistent and parallel to the binding jurisprudence of the Court of Justice of the European Union. Although we have express tax code provisions that are intended to strengthen the idea of the binding nature of the case law of the Luxembourg Court, they are applied in the alternative by the tax authorities. While the current discrepancy between tax theory and practice is high, we hope that the latest regulatory changes will

contribute to recognizing the legal force of the rule of law, normalizing VAT tax practice, and automatically receiving and enforcing EU Court of Justice's jurisdiction by the tax authorities.

NOTES

[1] The central objective of the tax audit is to establish the conformity between the tax status and the accounting and tax rules. It involves multiple connotations. The tax inspector is not a simple perceptor. He is a state official empowered to make appraisals with special consequences for compliance with tax legislation that has to assess the whole context of the state of affairs in order not to violate the rights of taxpayers. The tax inspector must know both the internal legislation and the relevant case-law of the EU Court of Justice and act in good faith.

[2] The recent practice of tax authorities is to suspend the resolution of the tax appeal until final settlement of the criminal proceedings. This solution is counterproductive for the taxpayer is counterproductive for the taxpayer who has become litigant.

[3] By implicitly confirming the Ispas anti-jurisprudence administrative practice.

[4] Engaging in a legal liability even independent of fault.

[5] Based on the notion of warranty.

[6] With regard to the case-law - a model which requires a certain type of legal discourse, see Jori and Pintore (1995, p. 136).

[7] Although it is a fundamental principle of taxation, the principle of legality has been violated many times. For example, "it was possible for three years (1992-1994) to receive corporation tax on an administrative act (GD no. 804/1991), which fundamentally modified the Law no. 12/1991" (Bufan and Minea, 2008, p. 18).

[8] Local taxes and duties can also be established by law-enforcement acts that are inferior to law, if there is authorization of the law (for example, through local council decisions).

[9] For the symbolism of the rule of law, see Chevallier (2012, p. 63 et seq.).

[10] What legal security does the administrative practice offer in the conditions in which, in 2013, company M, as a result of a fiscal audit, a record was drawn up by which similar live livestock purchases were analyzed and deemed to be lawful, and in 2017 - 2018 the same operations become illicit, meeting the constituent elements of a supposed tax evasion?

[11] According to the provisions of art. 3 lit. b) Tax Code.

[12] According to the provisions of art. 3 lit. e) Tax Code.

[13] Judgment of 12 January 2006, Joined Cases C-354/03 Optigen Ltd, C-355/03 Fulcrum Electronics Ltd and C-484/03 Bond House Systems Ltd. 16. Commissioners of Customs & Excise, ECLI:EU:C:2006:16.

[14] Judgement of C-439/04 Axel Kittel v Belgium and Case C-440/04 Belgium v. Recolta Recycling SPRL, ECLI: EU: C: 2006: 446.

[15] Judgement of 22 October 2015, C-277/14, PPUH Stehcemp sp. j. Florian Stefanek, Janina Stefanek, Jarosław Stefanekc.Dyrektor Izby Skarbowej w Łodzi, ECLI:EU:C:2015:719.

[16] European Union Court of Justice, decision of 16 May 2013, C-444/12, *Hardimpex Kft.* c. *Nemzeti Adó- és Vámhivatal Kiemelt Ügyek és Adózók Adó Főigazgatósága*, ECLI:EU:C:2013:318.

[17] European Union Court of Justice, decision of 6 December 2012, C-285/11, Bonik EOOD c. Direktor na Direktsia „Obzhalvane I upravlenie na izpalnenieto" - Varna pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite, ECLI:EU:C:2012:774.

[18] In the same sense is the Civil Decision no. 7217 / 12.11.2013 of the file no. 1059/54/2011 by the High Court of Cassation and Justice in which it is stated: how the tax authorities could not prove circumstances that would lead to the applicant's bad faith in carrying out the operations, the fact that the suppliers did not declare the deliveries to the applicant - there were no persons at the headquarters, that the supplying companies declared themselves inactive after the operations, cannot be imputed to the applicant.

References

1) Bufan, R. and Minea, M.Şt. coord. (2008). *Comented Fiscal Code.* Bucuresti: Wolters Kluwer.
2) Chevallier, J. (2012). *Rule of Law*. Craiova: Universul Juridic, Universitaria.
3) Costaş, C.F. (2016a). *Financial Law*. Bucureşti: Universul Juridic.
4) Costaş, C.F. (2016b). *Fiscal Law*. Bucureşti: Universul Juridic.
5) Jori, M. and Pintore, A. (1995). *Manuale di Teoria Generale del Diritto.* 2nd ed.Torino: Giappichelli.
6) Puţ, S.I. (2017). Tax Innocence in VAT deduction: from jurisprudence to norm. *Tax Magazine,* 12/2017, p. 742.

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THE RESEARCHER IN TAX LAW. BETWEEN THE FULFILLMENT AND THE FAILURE OF HIS CALLING. AN ANALYSIS OF THE ANTI-ABUSE TAX RULES IN THE EU

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Abstract
The main research problem which this papers addresses is a summary of all the research obstacles that the author has met with when writing his own doctoral thesis on the topic of abuse of tax law. Particularly, the author has faced an acute lack of points of reference in his specific research field, those cognitive elements meant to offer theoretical support and stability to one's study. It is distinctly relevant to note that most of the doctrine analyzing the juridical phenomenon of abuse of tax law within the EU find its "ultima ratio" argument in the EUCJ jurisprudence or in the EU legislation, without even attempting any critical assessment of these sources.
In this context, besides many other subsidiary research questions, the main research question guiding the present study is: ***why is it important for the abuse of tax law researcher to look for reference points in his investigation outside of the formal EU law sources he is examining?***
We will try to answer this question throughout the two main parts of this paper which will present ***(I.)*** *the hyper-specialization of the EU tax law researcher and* ***(II.)*** *the side effects of this hyper-specialization.*
To sum up, the answer to the research question (and of the thesis this paper will defend) will be that unless the researcher will look for reference points outside of the formal law sources he is studying, he will ultimately fail to fulfill his calling. Namely, by disregarding the points of reference of classical law epistemology, he will eventually become a mechanical repeater and an ideologist following shallow formalism.
Keywords: *abuse of tax law in the EU; tax law researcher's hyper-specialization; tyranny and anarchy; classical law epistemology.*
JEL Classification: K34

1. INTRODUCTION

The main research problem which this papers addresses is a summary of all the research hindrances the author has met with when writing his own doctoral thesis on the topic of abuse of tax law. Particularly, the author has faced an acute lack of points of reference in his specific research field, those cognitive elements meant to offer theoretical support and stability to one's study. It is distinctly relevant to note that most of the doctrine analyzing the juridical phenomenon of abuse of tax law within the EU find its *ultima ratio* argument in the EUCJ

jurisprudence or in the EU legislation, without even attempting any critical assessment of these sources.

When faced with the above described realities while researching the phenomenon of abuse of tax law within the EU, several questions have arisen. The first one aimed at understanding this "veneration" the tax law researcher shows towards the European tax law sources. Secondly, is this research problem indeed a serious research issue which deserves our attention? Moreover, assuming that the doctrine would critically asses the European law sources on the topic of fighting abuse of tax law, what assessment standard(s) would be used and how would the analysis be conducted? Finally, the researcher´s critical assessment of his study topic could determine his fulfilling or not of his calling, and as such, what exactly is the European tax law researcher´s calling/ purpose?

In this context, the main research question guiding the present study is: why is it important for the abuse of tax law researcher to look for reference points in his investigation outside of the formal EU law sources he is examining?

To sum up, the answer to the research question (and of the thesis this paper will defend) will be that unless the researcher will look for reference points outside of the formal law sources he is studying, he will ultimately fail to fulfill his calling. Namely, by disregarding the points of reference of classical law epistemology, he will eventually become a mechanical repeater and an ideologist following shallow formalism.

We will try to answer the main research question and to defend our thesis throughout the two main parts of this paper which will present (**I.**) *the hyper-specialization of the EU tax law researcher* and (**II.**) *the side effects of this hyper-specialization.*

2. THE HYPER-SPECIALIZATION OF THE EU TAX LAW RESEARCHER

This first part of our article will try to (**2.1.**) identify the problem that we are addressing, and then we will establish the rationale behind this state of affairs, of which (**2.2.**) the first is the current absence of theoretical fundaments, and (**2.3.**) the second is the ignoring of the classical foundations of legal epistemology and the confusion between doctrine and science.

2.1 Identification of the problem: the hyper-specialization of the EU abuse of tax law researcher

From our point of view, researchers in this area of tax law abuses, for the most part, know very well the niche field they are studying, but they lack the classical points of reference from the legal epistemology, especially the points of reference that the general theory of law has to offer. Namely, these hyper-specialists in tax law can assert that in the theoretical foundations of abuse of tax, the subjective side is only an element of probation of the objective side and

does not have a an independent existence (Piantavigna, 2011, p. 144), or they can very easily say - and without making any criticism - that in the matter of harmonized direct taxation, the CJEU equates the notion of "artificiality" with the abuse of law (Cerioni, 2010, p. 795).

For example, following the reading of certain findings drawn from the case-law of the CJEU – as in Cadbury, which has been repeated in other judgments, according to which „in order for a restriction on the freedom of establishment to be justified on the ground of prevention of abusive practices, the specific objective of such a restriction must be to prevent conduct involving the creation of wholly artificial arrangements which do not reflect economic reality, with a view to escaping the tax normally due on the profits generated by activities carried out on national territory" (Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v Commissioners of Inland Revenue, 2006, pct. 55) – many authors are tempted to say that „[t]his statement (...) confirm that in the ECJ tax case-law abusive practices coincide with wholly artificial arrangements" (Cerioni, 2010, p. 796).

On the other hand, supposing - absurdly - that this previous interpretation of EUCJ's case-law is correct, we consider profoundly wrong the passivity with which the hyper-specialist assumes this possible finding of the Court without a critical analysis of it. Thus, we see how the references of the specialized doctrine in the field of fiscal abuse find the *ultima ratio* in the EUCJ dictums (Prats, 2010, 129).

2.2 First explanation: the lack of fundaments, point of reference in the specific research field of tax law abuse

From our point of view, the first explanation of the fact that the CJEU dictums is the *ultima ratio* of researchers in the area of abuse of tax law is that this researcher does not have any theoretical foundations on which to base his research, point of reference in the specific research field of tax law abuse.

Thus, we have not even found a single bibliographic support, absolutely no reference – neither in Romania nor abroad – which could justify and explain why the tax abuse must be theoretically based on the conjunction of an objective and subjective criteria. The only idea we found in this respect and very succinctly motivated was that of Professor Rita of Feria from the University of Leeds, UK, who argued the idea that the rule of law would be seriously compromised if the CJEU would equate the concept of "artificial transaction" (the objective criteria) with the very notion of abuse of law (De la Feria, 2014) – thus eliminating the subjective criterion –.

2.3 Second explanation: the ignorance of the points of reference of classical law epistemology and the confusion between doctrine and science

Next, we will address the question of this situation has been reached in which we cannot find any fundament or point of reference in the specific research field of tax law abuse. From our point of view, the answer lies in the ignorance of the researcher in the area of abuse of tax law. Namely, given the fact that this researcher (**2.3.1.**) ignores the points of reference of classical law epistemology, he became much more (**2.3.2.**) susceptible to confounding doctrine with science.

2.3.1 The ignorance of the points of reference of classical law epistemology

If the researcher merely sums up the case law of the EUCJ in the field of abuse of tax law, without a critical analysis, he disregards the main purpose of any scientifical endeavor, namely to search the truth in the field – in a contradictory manner, by using as a method the principles of identity, non-contradiction, and excluded middle –. Of course, we do not claim that scientific research can reach the *Absolute Truth*, but we consider it a normal claim, an honest desiderate for the researcher to intent to seek the *scientific truth*. Therefore, the main objective of the researcher should be to issue true sentences about his object of study in order to reach the truth in his research field (Craiovan, 2013, p. 246).

The affirmation of this standard, the desideratum of scientific research, of the search for truth by the epistemologist, could be considered redundant for some, erroneous for others, but is particularly important from our point of view. This is because the purpose of research for the epistemologist has been a tumultuous field for us, that has caused us many internal struggles, following which we have transformed our intellectual position on this subject.

In this sense, reflect upon the position of Karl Popper, a personality considered to be one of the greatest philosophers of science in the twentieth century, particularly relevant and convincing. According to him, "[w]e can never absolutely assure that our theory is not shaky. All we can do is to look for falsehood content of our best theory", and "[w]e do it so insofar as we test it severely in the light of all our objective knowledge and our inventiveness". The author admits that "[i]t is of course always possible for the theory to be false, even if it can withstand all tests (...)",but in this situation „we have a good reason to assume that it does not have a higher fake content than its precursor (...) and that the new theory is more closer to the truth than the old one" (Craiovan, 2013, p. 23).

In particular, in the research field of the general theory of law, it was concluded that the conjunction of the objective criteria with the subjective criteria for the construction of the abuse of law is a fact of the evidence, which is

why it considers it to be a „contemporary point of reference" (Ignătescu, 2013, p. 107).

2.3.2 The confusion between doctrine and science

From the ignorance of the points of reference of classical law epistemology also results the confusion that the researcher studying the abuse of tax law makes between doctrine, on the one hand, and science, on the other. In this sense, we have found to be particularly relevant the contribution of Professor Gheorghe Mihai, who distinguishes between doctrine and science, a perspective which we will briefly describe in the following.

The author mentions that "[a] legal doctrine elaborated methodically by epistemological value stands in the proximity of what is called scientific theory in a strong sense. This is because the doctrinal views are plausible, while those of a scientific theory are true" (Mihai, 2009, p. 4), because "rigorously, the doctrinal opinion is not one with the scientific hypothesis. We are dealing with different situations" (Mihai, 2009, p. 4). It further states that "legal doctrines seeking to detect significance in terms of the localist spirit of law and in terms of the purpose pursued by the localist legislature when considering a legal institution; indeed, the legal doctrines are not seeking solutions that could be true (the truth being universal) or just (which would be fundamental), but efficient/ effective in the area of regulations in force here and now" (Mihai, 2009, p. 22).

Analyzing the author's opinion, we can draw the following conclusion from it, that while, on the one hand, the doctrine tries to convince, on the other hand, science is trying to seek and find the truth.

3. THE SIDE EFFECTS OF THE HYPER-SPECIALIZATION OF THE LAW TAX LAW RESEARCHER

In this second part of our study, we will try to identify the side effects of the hyper-specialization of the researcher in the area of abuse of tax law. In this respect, we will identify (**3.1.**) the existing linguistic confusion, (**3.2.**) the oblivion of the lessons of the history of law, and (**3.3.**) the practical effects consisting of slipping towards tyranny or anarchy.

3.1 A theoretical side effect: a language issue – a grave terminological confusion

The lack of theoretical foundation in abuse of tax law can be noted, in our opinion, first and foremost, at the linguistic level. Namely, there is a strong terminological confusion in describing the phenomenon of abuse of tax law, many notions are used – such as "avoidance", "circumvention", "fraud", "planning", "optimization", etc. – whose content are not very clear.

Thus, this confusion is not only present in the political (Juncker, 2014, p. 4-5) or administrative (Remeur, 2015, p. 1) language, accepted as obvious partisan

– when most of the time, while, on the one hand, a taxpayer would consider his behavior as a "tax optimization" strategy, on the other hand, the tax authority will tend to regard the same behavior as a "tax abuse" strategy (Likhovski, 2004, p. 1) –, but also in the so-called scientific research – such as in the Romanian (Neacșu, 2017, p. 602) or international (Prats, 2010, p. 58) doctrine or in the case-law of the Court of Justice of the European Union (Freedman, 2011, pp. 377-378) –. For example, the EUCJ itself uses terms such as "avoidance" or "circumvention", "evasion", "fraud" or "abuse" in a seemingly interchangeable manner (De la Feria, 2008, p. 396).

3.2 The second theoretical side effect: the oblivion of our history of law - a lesson from the history of Romanian Law, the case of professor Ion Deleanu's position against communist ideology in the research field of abuse of law

The second side effect of the hyper-specialization of the researcher in tax law is that he forgets the history of law and the lessons it offers. We will specifically refer to the lesson that Professor Ion Deleanu offers us, a lesson about resistance to ideology and the search for scientific truth.

First of all, however, we will make a small ***assessment of the institution of abuse of law as it was accepted in the socialist legal systems***. Theoretically, the subjective rights of individuals were also guaranteed in the socialist states, but they were conditional on being effectively exercised consistently with the general public interests (Pribac, 2008, p. 31). As well as the recent doctrine, in legal systems of socialist origin, abuse of law was based exclusively on objective criteria, finalist theory, so it was given priority to the purpose of protecting society, and protection of interest was placed secondarily (Pribac, 2008, p. 31).

The legislation that best reveals the *status quo* of the abuse of law in Romania during the communist period is the Decree no. 31/1954 regarding natural and legal persons. This Romanian regulation, an expression of the communist regime existent at the time, provided in general terms that subjective rights are protected by law only insofar as they are exercised in accordance with their economic and social purpose.

Also, the comparative right reveals the same tendency of other socialist states to establish the objective criterion as the sole basis of the abuse of law. The most eloquent example is the civil law of USSR from 1923, according to which „civil rights are protected by law, unless they are exercised against their economic and social purpose" (Deleanu, 1988, p. 60). Identical, the same objective conception of abuse of law was also present in the former USSR states, such as the German Democratic Republic (Deleanu, 1988, p. 59), Poland (Pribac, 2008, p. 32), Hungary (Deleanu, 1988, p. 60) or Czechoslovakia (Deleanu, 1988, p. 59).

With the provisions of art. 1-3 of Decree no. 31/1954, most of the Romanian legal doctrine during the communist regime manifested its theoretical position that in Romanian law the only basis for identifying and sanctioning the abuse of law would be the objective or finalist criteria (Deleanu, 1988, p. 70). The jurisprudence went in the same direction, holding, for example, that „[s]ubjective rights being recognized only for the purpose of satisfying legitimate interests, overcoming that purpose and exercising a subjective right without legitimate interest constitutes an abuse of law" (Mangu, 2016, pp. 175-176).

Thus, the conclusion expressed in the nowadays doctrine, to which we too rally, becomes more than obvious. According to it, „in the socialist view, abuse of rights meant the misappropriation of the right to satisfy the interests of individuals, but the interests which necessarily had to relate to the interest of the whole society, the latter having priority over the former" (Pribac, 2008, p. 31).

In this context, the statement of the communist legal doctrine in Romania – for it would be erroneous to grant this doctrine the appellation "Romanian" because the author is not Romanian, but Russian, only the work is published in Romania – according to which „[e]xercising their rights, the subjects of civil law must take into account the purpose of these rights, which serve to satisfy their interests combined with the interest of the whole society" (Pribac, 2008, p. 32) is, from our point of view, a euphemism. This statement could very well be translated as follows: the subjective right of a person is important only insofar as it is exercised in the interest of the community; otherwise, exercising it by harming the interest of the community – a violation of the social and economic purpose of the rule – is considered to be an abusive one.

In this general framework of regulation on abuse of law, impregnated with a profound marxist ideological character, accompanied by a doctrine of its own (Ioffe, 1960, pp. 217-218), we consider extremely important to note the contribution of Professor Ion Deleanu, whose research efforts have managed – through his work "Subjective rights and abuse of law" published in 1988, a year before the change of the communist regime in Romania – to delimitate the abuse of aw from the considerations of communist ideology.

Namely, contrary to the conclusion of the application of the objective criteria as the only criterion for establishing of the abuse of law – a conclusion resulting from the simple grammatical construction of art. 3 to 5 of Decree no. 31/1954 regarding natural and legal persons –, Professor Deleanu, proposing a systemic interpretation of the law, argued for the conjunction of the objective criteria with the subjective one (Deleanu, 1988, p. 70). Thus, he identified both in the applicable Civil Code at that time, and the Code of Civil Procedure some normative texts regulating the matter of abuse of law that could justify the necessity of both of the criteria for establishing the existence of abuse of law, objective and subjective one (Deleanu, 1988, pp. 70-71). Consistently, Professor

Deleanu sought, identified and presented in the paper a rich jurisprudence that supported his theoretical approach (Deleanu, 1988, p. 71).

Thus, we note that while the great part of the Romanian legal doctrine has diminished the ideal of legal research to the communist ideological orientation, we welcome the doctrinal position of Professor Ion Deleanu, a position by which he "saved" the institution of abuse of law from the ideology of the Romanian communist regime.

In this context, we consider it inadmissible to forget the contribution made by Professor Ion Deleanu in the legal research of the abuse of law, especially since this contribution was made during the domination of communist regime in Romania, an input according to which the cumulation of the two criteria – objective and subjective – in order to establish the existence of abuse of law is a necessity, an "organic bonding" (Deleanu, 1988, p. 70).

3.3 Some practical side effects: slipping into tyranny and anarchy

Finally, this last part of our study, will try to disclose the two extreme outcomes to which a wrong theoretical support in assessing the abuse of law can lead, **(3.3.1.)** tyranny, when we assess the abuse of law only by the objective criteria, and **(3.3.2.)** anarchy, when we assess the abuse of law only by the subjective criteria.

3.3.1 The tax case-law argument for the tyrannical character of the construction of the abuse of law exclusively on objective criteria

We have stated above that the construction of the abuse of law exclusively on the objective criterion and ignoring the subjective one is a feature of the socialist states, dominated by the Marxist-communist ideology. In this sense, in addition to the obvious argument of the prevalence of collective interest on the individual that is inherent in the objective criterion, there have been in the French doctrine, for example, voices who criticized the exclusively objective theory on the ground that it tends to "«socializing subjective rights», or that through it, it slips to the exclusively political appreciation of the limits in which the subjective rights are exercised" (Deleanu, 1988, p. 71).

And yet, in order not to fall into the trap of the jargon argument – as if the communist socialist states had this feature of construction of abuse of law exclusively by the objective criteria, which was the assumption of the collective interest over the individual, it is *eo ipso* that this theory of abuse of law is an undesirable –, we find it appropriate in order to give a strong argument to this study to provide an empirical argument. Namely a specific case over which, applying the exclusively objective criteria for the construction of the abuse of law, we will be able to identify in specific terms the negative effect on human rights and freedoms.

To support the above, we will turn to the EUCJ jurisprudence of tax law, from which we will choose as a support of our reasoning a very well-known case of the EU court, a case having as its object a preliminary ruling from Curtea de Apel Cluj regarding VAT, Salomie and Oltean (Florin Salomie and Nicolae Vasile Oltean v Direcția Generală a Finanțelor Publice Cluj, 2015). Starting from the concrete situation of the case that we will briefly present, and inspiring from it, we will propose a theoretical construction of a situation that will undoubtedly prove the necessity of the subjective criteria alongside the objective one, as follows.

First of all, with regard to the facts of the case Salomie and Oltean, this are relatively simple. In 2007, Mr. Salomie and Mr. Oltean entered into an association agreement, without legal personality and unrecognized or registered for VAT purposes, with five other persons for the purpose of carrying out a project for the construction and sale of four buildings in Romania. In the following years, 2008 and 2009, from the total number of 132 apartments built on the land belonging to the private patrimony of one of the associates, 122 were sold, for a total amount of 10,902,2775 lei, with the observation that these sales were not subject to VAT. In 2010, on the occasion of a tax audit, the Romanian tax authority requalified the transactions carried out, considering that they should have been subject to VAT as of 1 October 2008, because, on the one hand, those transactions were an economic activity with continuity, and, on the other hand, the turnover resulting from those transactions exceeded the 35,000 euro threshold as of August 2008. In this respect, the tax authority issued several tax decisions for the main and accessory debts, having as object the amount of VAT due for the previous transactions during 2009. Mr. Salomie and Mr. Oltean commenced a legal dispute concerning the partial annulment of the respective taxing decisions, in which the Court of Appeal of Cluj allowed, in the appeal, their request for referral of the CJEU with a preliminary ruling.

By way of preliminary ruling, the Cluj Court of Appeal essentially addressed the question of the conformity with the principle of legal certainty of the respective tax decisions issued by the Romanian tax authority, referring to three particularities. First, in the Romanian tax legislation there are no methodological rules of application of VAT on real estate transactions, only starting from January 1, 2010. Second, the tax administration practice up to that date generally consisted in exempting transactions such as those in the present case from the payment of VAT. Thirdly, the Romanian tax authority had enough information to consider Mr. Salomie and Mr. Oltean as taxable person regarding VAT as early as 2008, because their transactions were taxed on the former Article 77^1 of the Tax Code, article entitled "Definition of the income from the transfer of real estate property".

The answer given by the CJEU – part of it that is relevant to this research – was that „the principles of legal certainty and of the protection of legitimate

expectations do not preclude, in circumstances such as those of the dispute in the main proceedings, a national tax authority from deciding, following a tax audit, to subject transactions to VAT and to impose the payment of surcharges, provided that that decision is based on clear and precise rules and that that authority's practice has not been such as to give rise, in ***the mind of a prudent and well-informed trader, to a reasonable expectation that that tax would not be levied on such transactions,*** this being a matter for the referring court to determine. The surcharges applied in such circumstances must comply with the principle of proportionality" (Florin Salomie and Nicolae Vasile Oltean v Direcția Generală a Finanțelor Publice Cluj, 2015, par. 35).

This conclusion of the Court therefore means that, in order to comply with EU law, the action of the tax authority to reclassify – with all the resulting consequences – a taxpayer's transaction must fulfill two conditions, an objective one, and a subjective one. On the one hand, the objective condition – summed by the principle of legal certainty – presupposes the existence of a certain and predictable rule whose content the taxpayer has violated by its conduct. On the other hand, the subjective condition – summed by the principle of the protection of legitimate expectations – implies that the practice of the tax authority on that rule was not capable of giving rise, in the perception of a prudent and informed economic trader, to reasonable and legitimate confidence for the inapplicability of that rule.

Regarding this latter subjective condition concerning the perception of the taxpayer, it has been said in the Romanian doctrine that „national courts will have to verify the extent to which national tax authorities have given targeted taxpayers' «precise assurances regarding the non-application of VAT to real estate transactions»" (Costaș and Vidrean-Căpușan, 2015, p. 351). In other words, it will be necessary to analyze, in each case, "the steps taken by the taxpayer to clarify his tax situation at the time of the real estate transactions and the answers provided by the tax authorities" (Costaș and Vidrean-Căpușan, 2015, pp. 351-352).

In order to highlight the relevant aspect of this Court's conclusion for our research, we will reformulate this conclusion of the EUCJ from the paradigm of abuse of power by the public tax authority, in the paradigm of taxpayer abuse of law.

That the conclusion reached by the Court could be read in the sense that, in order to establish the abusive nature of a taxpayer's conduct, it is not sufficient for it to infringe the purpose of the tax law, on the one hand, but it must also be held that that taxpayer did not have the perception of the inapplicability of that rule, a justified perception and based on the practice of tax authority. It is clear, read in this manner, that it is necessary to cumulate the objective and subjective criteria in order to establish the abuse of law (abuse of tax law in our case).

Secondly, inspired by what happened in the case of Salomie and Oltean, as we have said above, we are going to propose the theoretical construction – only sensitively different from that of the analyzed case – of a situation that will undoubtedly prove the necessity of the subjective criteria along with the objective one.

Namely, let us imagine how in a situation similar to that of Salomie and Oltean would unfold, if the EUCJ would have applied only the objective criteria, of the purpose of the tax rule, and if it would have ignored the subjective criteria, of the taxpayer's perception of administrative practice. We would have witnessed a situation where a taxpayer's transaction would have been reclassified as being inconsistent with the purpose of the tax rule, despite the existence in the public space of statements by the representatives of the tax authority in the sense of not breaching the purpose of the tax rule (Costaș and Vidrean-Căpușan, 2015, pp. 358-360), despite written responses given by the tax authority to the taxpayer to clarify that it does not infringe the purpose of the tax rule (Costaș and Vidrean-Căpușan, 2015, pp. 358-360), and despite some answers and interpretations sent by the tax authority to specialists in the field who offered specialized advice to taxpayers (Costaș and Vidrean-Căpușan, 2015, pp. 358-360) – notaries, tax consultants, lawyers, accountants or other professionals –.

From our point of view, we would have witnessed a totally absurd situation that clearly shows the contradiction between a tyrannical fiscal (legal) system, whose specificity is that it is trying to fit any human activity into a pattern given by an idea, on the one hand, the unpredictability of the person and the activity of the human being, on the other. We would find ourselves in a situation where the behavior of the taxpayer is considered abusive only because it constitutes a violation of the purpose of the tax legal norm, the purpose of the rule that was erroneously explained, interpreted and applied by the tax authority itself.

3.3.2 The tax case-law argument for the anarchic character of the construction of the abuse of law exclusively on subjective criteria

Being enlightened with tax jurisprudence, the tyrannical feature of the construction of the abuse of law exclusively on the objective criteria, we cannot ask ourselves what would be the consequence of its construction solely on subjective criteria. Namely, which would be the concrete result in the theoretical construction of the abuse of law solely on the subjective criterion, that of the taxpayer's intention?

From our point of view, the exclusion of the objective criterion in assessing the behavior of the taxpayer and the assessment, consequently, only on the basis of the subjective criterion, we consider not only as it was said in subjective theory" (Deleanu, 1988, p. 64), individualistic, exclusive and unstable, but rather anarchic. We consider that this statement can be argued with the power of evidence by using the same above mentioned case law, Salomie and Oltean.

Namely, let us only imagine how it would have been in a situation like the one in the case of Salomie and Oltean, the EUCJ would have applied only the subjective criterion centered on the perception of the economic operator to determine the existence of abuse of law.

The fruit of such an exercise of imagination would, on the one hand, destroy the stability of the social organization on the basis of the legal norm and would, in our opinion, disintegrate the essence of the notion of "rule of law" and, on the other hand, would make it punishable those facts referred to in the criminal doctrine as "putative", acts committed by a person who is conscientious about the representation of an abuse of (tax) law, but in fact the act does not infringe the purpose of the legal (tax) norm.

4. CONCLUSIONS

Arriving at the end of this paper, we consider that the answer to the main research question – *why is it important for the abuse of tax law researcher to look for reference points in his investigation outside of the formal EU law sources he is examining?* – is obvious. That is, if he does not search for reference points outside formal legal sources, the researcher will slip, willingly or unwillingly, but certainly intowards tyranny or anarchy, both possible outcomes as equally dangerous to the development of the human person.

On the other hand, during the present study, we believe that we responded, at least in part, to the subsidiary research questions outlined in the introduction above. Thus, a possible explanation for the hyper-specialization of the researcher in the tax law, we consider that he could stand in the oblivion, namely in forgetting the classical points of legal epistemology, and at the same time we consider that we clearly showed that the issue addressed is of utmost importance, especially due to the catastrophic effects that it can generate (tyranny or anarchy). Also, the specific points of reference offered by classical legal epistemology are, in essence, the quest for legal truth by using as a method the principles of identity, non-contradiction, and excluded middle, and the researcher's vocation in tax law can only be to seek the truth in the field of taxation.

Finally, unless the researcher will look for reference points of reference outside of the formal law sources he is studying, he will ultimately fail to fulfill his calling, which is that to search the truth in tax law. We think that it has become became obvious that by disregarding the points of reference of classical law epistemology, the tax law researcher will ultimately become a mechanical repeater and an ideologist following shallow formalism.

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References

1) *Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v Commissioners of Inland Revenue* [2006] Case C-196/04, European Court Reports 2006 I-07995, (EUCJ).
2) Cerioni, L. (2010). The «Abuse of Rights» in EU Company Law and EU Tax Law: A re-reading of the ECJ case-law and the Quest for a Unitary Notion. *European Business Law Review,* 21(6), pp. 783-813.
3) Costaş, C.F. and Vidrean-Căpuşan, T. (2015). TVA imobiliar reinterpretat. Dezlegarea litigiilor naţionale în lumina hotărârii CJUE în afacerea Salomie şi Oltean. *Tax Magazine*, 7, pp. 346-360.
4) Craiovan, I. (2013). *Un posibil ghid pentru cercetarea ştiinţifică în domeniul dreptului.* Bucureşti: Pro Universitaria.
5) De la Feria, R. (2008). Prohibition of Abuse of (Community) Law: the creation of a New General Principle of EC Law through Tax?". *Common Market Law Review*, 45(2), pp. 395-441.
6) De la Feria, R. (2014). *Abuse of Law in VAT: from Halifax to Ocean Finance.* [online] AvalaraVATlive. Available at: https://www.vatlive.com/vat-news/guest-blog-abuse-law-vat-halifax-ocean-finance/ [Accessed 05.04.2018].
7) Deleanu, I. (2008). *Drepturile subiective şi abuzul de drept.* Cluj-Napoca: Dacia.
8) *Florin Salomie and Nicolae Vasile Oltean v Direcţia Generală a Finanţelor Publice Cluj* [2015] C-183/14, Reports of Cases published in the electronic Reports of Cases, (EUCJ).
9) Freedman, J. (2011). The Anatomy of Tax Avoidance Counteraction. In: R. De la Feria and S. Vogenauer, coord., *Prohibition of Abuse of Law. A new General Principle of EU Law?.* Oxford: Hart publishing, pp. 381-396.
10) Ignătescu, C.M.C. (2013). *Abuzul de drept.* Iaşi: Lumen.
11) Ioffe, O.S. (1960). *Drept civil sovietic.* Bucureşti: Ed. Ştiinţifică, pp. 217-218.
12) Juncker, J.-C. (2014). *Mission letter. Pierre Moscovici Commissioner for Economic and Financial Affairs, Taxation and Customs.* [online] Available at: https://ec.europa.eu/commission/sites/cwt/files/commissioner_mission_letters/moscovici_en.pdf [Accessed 07.04.2018].
13) Likhovski, A. (2004). The Duke and The Lady: Helvering v. Gregory and the History o Tax Avoidance Adjudication. *Cardozo Law Review*, 25(3), pp. 953-1018.
14) Mangu, F. (2016). Răspunderea civilă delictuală pentru abuzul de drept civil – o răspundere subiectivă sau obiectivă?. In: L. Bercea and F. Mangu, coord., *Abuzul de drept. In honorem Ion Lulă.* Bucureşti: Universul Juridic, pp. 173-183.
15) Mihai, G. (2009). *Fundamentele dreptului. Vol. I. Ştiinţa dreptului şi ordinea juridică.* 2nd ed. Bucureşti: C.H. Beck.
16) Neacşu, C. (2017). Soluţii comunitare în lupta României cu evaziunea fiscală a multinaţionalelor. In: *10 ani de la aderarea României la Uniunea Europeană. Impactul asupra evoluţiei dreptului românesc, Volumul sesiunii ştiinţifice cu acelaşi nume, organizată de Institutul de Cercetări Juridice „Acad. Andrei Rădulescu" al Academiei Române*, 31 martie 2017. Bucureşti: Universul Juridic, pp. 602-610.

17) Piantavigna, P. (2011). Tax Abuse in European Union Law: A Theory. *EC Tax Review*, 20(3), pp. 134-147.
18) Prats, F.A.G. (2010). The «Abuse of Tax Law»: Prospects and Analysis. In: G. Bizioli, coord., *Essays in International and European Tax Law.* Napoli: Jovene editore, pp. 50-148.
19) Pribac, V. (2008). *Abuzul de drept și contractele de muncă*. București: Wolters Kluwer.
20) Remeur, C. (2015). *Tax policy in the EU. Issues and chalenges*. European Union, European Parlimentary Research Service.

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TOWARDS A MAGNA CARTA OF TAXPAYERS' RIGHTS IN THE TIMES OF THE HUNGER GAMES?

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Abstract
While looking at different tax cases around the world and particularly to the increasing powers of tax administrators, one asks himself whether taxpayers aren't actually participating in some sort of modern (tax) hunger games. A possible answer to this question is developed in this article by means of a comparative analysis of public and private efforts to put the taxpayers' rights into a respected charter of rights. The author focuses on a number of specific discussions regarding tax procedure issues and the possible outcome of a private regulation project. The article could actually be regarded as an early draft of a script concerning the story of taxpayers' rights under the constant pressure of public authorities, particularly in the tax field.
Keywords: *taxation, taxpayers, taxpayer's rights, Magna Carta, taxpayers' code, tax administration, taxpayers' charter.*
JEL Classification: K34

1. A DYSTOPIC STORY OF TAXPAYERS

A modern taxpayer throughout the world has to face a number of challenges, as different and opposite concepts present themselves: public interest and private life; criminal liability and tax liability; European (transnational) law and national law; tax fraud and tax optimization; interest and damages; tax obligations and fundamental rights; tax administrator and public budget. In fact, one might simply ask how people are even able to do business anymore while having to deal with all these matters.

It would strike as obvious that the two main concepts employed by the title of this modest contribution are *taxpayer* and *hunger games*. On one hand, no matter the tax system and the applicable rules, the taxpayer is the key element to whom both financial law (for the good use of public funds) and tax law (for the collection of public income) refer to. In a nutshell, public budgets are built considering *taxpayer(s)' needs*, while the collection of the most important part of public income – that is fiscal revenues – is valuating *taxpayer(s)'ability to pay*. Actually, without taxpayers there is no reason for building up budgets and no means of actually fuelling such budgets on a permanent basis (as we well remember, up to the 19th century, political administrations would raise event-budgets for crusades, weddings, religious constructions and so on).

On the other hand, states' fiscal administrations seem to follow the dystopic approach so brilliantly portrayed by George Orwell's *1984*: *He who controls the past controls the future. He who controls the present controls the past.* Therefore, the relationship with the taxpayer is transformed into a *hunger game*, in which the rules of game are unilaterally established, the taxpayers are randomly selected to participate in the (hunger) game, the playing field has a variable geometry and the game controller can alter at any time, public (media or social media) executions are based on the *Panama Papers* model, while the liability of the *Big Brother* does not exist [1].

As in any good movie, a question sets the plot: Is it possible, under those circumstances, to have a Magna Carta of taxpayers' rights?

2. THE PUBLIC ALTERNATIVE: PROJECT OF THE EUROPEAN TAXPAYERS' CODE

As part of its 2012 *Action Plan against Tax Fraud and Tax Evasion,* the European Commission launched in 2016 a document entitled *Guidelines for a Model for a European Taxpayers' Code.* Despite the difficulties even when setting up the name for this project, the document never became more that a *soft law* instrument, that is a mere recommendation for the Member States of the European Union. It can be generally described as a unilateral statement of rules and principles that tax administration(s) would like to implement when dealing with taxpayers with the specific aim of ensuring an adequate balance between the rights and the duties of those taxpayers.

This possible proposal for a *Magna Carta* of taxpayers' rights is more likely to be the result of a process started in 1990 at OECD (Organisation for Economic Co-operation and Development) in order to actually identify taxpayers' rights. It seems to us, in a general background, that the protective case-law of European courts and Charter of Fundamental Rights of the European Union accelerated the process.

As one might notice, the document made public by the European Commission is rather short and somehow improved by certain examples of good practices provided by national tax administrations. A few examples might come in handy:

Article 3.1.1. Lawfulness and legal certainty

Taxpayers can expect: to pay tax only as required by law; tax administrations to apply the law reasonably and consistently; openness about the intention of tax laws, rules and procedures; tax administrations' decisions to be consistent with the wording of the law; tax administrations to apply sanctions only as provided for by law.

Tax administrations will expect: taxpayers to meet their legal obligations; taxpayers to respect tax administrations' right to administer the tax system according to law, including sanctions.

Article 3.3.3. Audit process

Taxpayers can expect: at the beginning of or when notified of an audit process, to ask or to be informed about their rights and obligations; tax administrations to communicate to them the character of the tax audit; to be informed if the tax administration review or adapt the overall scope of an audit; to be able to give information in order to explain and better clarify their position, in accordance with the law; in general, to have the opportunity to discuss the results of the audit before the final report; tax administration to communicate clearly to them the conclusions and consequences of a tax audit.

(*Guidelines for a Model for a European Taxpayers' Code*, selected)

To our knowledge, the proposed recommendations of the European Commission did not have an immediate or significant effect in this field. On one hand, the proposed model resembles a (political) declaration of good will, but has not binding effect for Member States or for their tax administrations. Therefore, except for the cases where national (procedural) rules would provide otherwise, it is simply for the tax inspectors to decide whether they apply such rules of good will or not. And it is highly probable that tax inspectors wouldn't apply such rules, as at least some of them interfere with the right to independently carry tax audits and recover money for the public purse.

On the other hand, the soft rules proposed can already be found at national level. Take Romania, for example, where every tax inspector would give the taxpayers, before the audit begins, a copy of their available rights. Still, under Romanian tax law there is no possibility for the taxpayer to check the administrative file that supported the issuing of a tax decision, although the Court of Justice of the European Union ruled against the Government in the recent *Ispas* case [2]. Therefore, there is no actual recognition of a very important component of the right of defense, which is access to file.

Therefore, we must conclude that the public project put forward by the European Commission is just an exercise of image, so that European and national tax administrators claim they are doing *the right thing*. In fact, tax *Big Brothers* at both levels would prefer to keep their possibilities open, spy on the taxpayers whenever possible, issue the biggest tax decisions available before providing access to file and generally ignoring taxpayers' rights. Apart from a few judicial developments (such as the *Fransson* or *Ispas* case-law), European Union is left-back.

3. THE PRIVATE ALTERNATIVE: MODEL TAXPAYER CHARTER PROJECT

The climate seems to be slightly different in the private field. Actually, there is a private alternative developed by three major professional bodies: Confédération Fiscale Européenne (CFE), Asia Oceania Tax Consultants' Association (AOTCA) and Society of Trust and Estate Practitioners (STEP), launched in 2013.

The *Model Taxpayer Charter* was drafted in 2013 based on an analysis regarding taxpayers' rights and duties carried in 37 countries representing 73% of the gross domestic product worldwide. The 2015 version extended the research to 41 countries and 80% of the world's gross domestic product.

The purpose of the *Model Taxpayer Charter* is to provide for a regulation template that could be adapted and used by states that wish to implement in their own legislation the basis of a balanced approach between taxpayers' rights and duties. The model is in fact the result of the experience of some 500,000 members (mainly tax advisors) of the three professional bodies that worked on the document. The *Model Taxpayer Charter* (2015 version) consists of 37 articles with explanations.

In our opinion, it is worth reading the *Model Taxpayer Charter* in the light of some current taxpayers' issues.

A. *Drafting and interpretation of tax legislation.* As a matter of fact, the issues of drafting tax legislation and interpreting it clearly is one of the major points of discussion at the European level, as a result of (i) frequent legislative changes; (ii) technical language; (iii) lack of interpretation or inadequate interpretation; (iv) retrospective application of legislation [3].

Model Taxpayer Charter (2015) approaches this issue from a triple perspective: art. 17 – Tax legislation (standards of drafting tax legislation); art. 18 – Retroactivity of legislation; art. 12 – Rulings and interpretations.

The key point of this discussion is of course a *standard of quality and foreseeability of tax legislation and subsequent interpretations.* "A wise man can aquaint himself with them before the morning is over; a stupid man can learn them in the space of ten days" said back in 1446 the Korean king Sejong, when he invented the 28 letters Hangul alphabet, a considerable advance compared to the old Chinese alphabet and a strong explanation for the almost 100% literacy rate in nowadays South Korea.

Art. 17 of the *Model Taxpayer Charter* provides:

Tax legislation shall be written in clear and unambigous language such that a taxpayer without specialized professional knowledge shall be able to understand the general provisions of the tax law with reasonable time, effort and study except for areas that would reasonably require specialized knowledge.

Such a standard implies the professionalization of tax legislation drafting, including the secondary legislation and the correct translation/transposal of the supranational legislation; but, in the national *hunger game*, the law usually awaits for a proper interpretation made by means of explanatory norms (*norme metodologice*, in Romanian tax law). This mission might be better confined to universities or to a professional body acting in the tax field. At the end of the day, tax interpretation should not be reserved to tax inspectors but should result naturally from the reading aloud of the text(s).

Art. 18 of the *Model Taxpayer Charter*:

Where legislation has the effect of causing something to be subject to tax which was not previously so subject or changing the tax consequences flowing from completed transactions, transitional rules should be provided to enable a fair and reasonable transition.

This text would have helped in the Romanian case, for example, as far as the model of a natural person as a real estate developer is concerned. We should take into account that in 2016, the national tax administration initiated tax audits aiming at the retrospective taxation at a 16% rate of taxpayers that actually paid a 1 to 3% income tax, while in 2018 the Parliament provided for a tax amnesty of supplementary debts.

Art. 12 of the *Model Taxpayer Charter*:

The tax administration shall not maintain secret positions on the interpretation of legislation or based on fiscal data, and where the tax administration adopts a position, it shall be published and made generally available to taxpayers and tax advisors.

This could be true, except for one place: Direction of General Regional Public Finances in Cluj-Napoca (room 201) ignores what Direction of General Regional Public Finances in Cluj-Napoca (room 205) says, based on the argument that there is no complete identity between the audited taxpayer and the taxpayer that requested tax guidance on exactly the same matter; therefore, as in a true *hunger game*, the decision on a specific tax matter is totally arbitrary.

B. *Access to adminstrative file, as a component of the right of defence.* In its judgement of 9 November 2017 in case C-298/16, *Ispas*, the Court of Justice of the European Union ruled:

33 In a tax inspection procedure, the purpose of which is to verify whether the taxable persons have performed their obligations in that regard, it is indeed legitimate to expect that those persons would request access to those documents and information with a view to, if need be, providing explanations or supporting their claims against the point of view of the tax authorities.

34 If the rights of the defence are to be genuinely respected, there must nonetheless be a real possibility of access to those documents and that information, unless objectives of public interest warrant restricting that access.

We believe that the judgment in the *Ispas* case is a *major achievement for the right of defence,* as right of access to file is specifically recognized in the field of VAT (after being previously acknowledged in custom cases or in competition cases). As a consequence, Member States must adapt their legislation concerning access to file or write such a legislation.

Court of Appeal in Cluj-Napoca ruled in its judgement no. 385 of 6 December 2017 and forced tax administration to ensure access to file and to re-discuss the tax challenge in respect of the right of defence. One could note this is

a single decision in Romania after the judgment in the *Ispas* case, as in Romania requests for access to file are generally dismissed in reference to article 11 of the Romanian Tax Procedure Code (fiscal secrecy). Although documents are secret for the taxpayer, who's denied access to file, the same documents and information are used as evidence by the tax administration during the tax assessment and in court.

It is our observation that Member States are busy with *hunger games* (that is making money for the state budget in an effort to cut budget deficit) and have no time for drafting legislation in this field.

This should clearly be compared to art. 9 par. (3) of the *Model Taxpayer Charter*:

The taxpayer shall be provided by the State with all relevant and appropriate information on a timely basis supporting the findings of the audit or enquiry upon request by the Taxpayer in connection with an appeal except where there is a valid reason to withhold certain information (such as confidential information obtained from third parties).

C. *Burden of proof.* As many of us well remember, the Court of Justice of the European Union ruled in its *Optigen / Axel Kittel* case-law, followed by the Eastern European case-law, that in the field of value added tax the burden of proof is with the tax administration, which has to prove the actual participation or knowledge of the taxpayer in a tax fraud mechanism [4].

In the Romanian *hunger game*, at least until 1 January 2018 when article 297 par. (8) of the Romanian Tax Code came into force, the tax administration considered that *playing evidence* means that a taxpayer has to prove its innocence, while tax inspectors can simply rule on suspicions and reasonable clues.

A better view of the same matter is provided by art. 16 *Model Taxpayer Charter*:

1. A statute of limitations on audit and reassessment shall be clearly stated, with the burden of proof on the Tax Administration in any matters which result in the normal statute of limitations being extended. 2. The burden of proof to demonstrate the applicability of anti-avoidance legislation shall be on the Tax Administration. 3. In any appeal of the penalty the burden of proof to justify the penalty rests on the Tax Administration and in particular the Tax Administration is required to prove the facts for the justification of the penalty. 4. In other circumstances the burden of proof lies normally with the Taxpayer.

4. CONCLUSIONS

In a nutshell, it seems to us that the only actors interested in writing a different script are taxpayers and their tax advisors. OECD, the European Commission, various transnational or national bodies have no real appetite for a

new script, since the *hunger game(s)* provide enough entertainment already. The questions therefore is: Do we keep watching the *Hunger Games* and acting when required as if nothing happened, or do we start (re)thinking it over?

It is also our conclusion that the private project aiming at providing templates for improved public action, as far as taxpayers' rights are concerned, is the only available solution. A certain degree of implication is therefore needed. Doctrine should really pay attention to such initiatives, while legislators should consider them better. Last but not least we believe that an international account of tax legislations and procedures is also valuable on the table of each (tax) judge, in order to better understand the procedures and the objectives of tax rules, in an international and comparative environment [5].

NOTES

[1] A *dystopia* (from the Greek δυσ- and τόπος, alternatively, cacotopia, kakotopia, cackotopia, or anti-utopia) is the vision of a society that is the opposite of utopia. A dystopian society is one in which the conditions of life are miserable, characterized by human misery, poverty, oppression, violence, disease, and/or pollution. George Orwell's *Nineteen Eighty-Four* is a dystopia because its leaders do not aspire to or use the rhetoric of utopia to justify their power.

[2] CJEU, judgment of 9 November 2017, case C-298/16, *Ispas*, ECLI:EU:C:2017:843.

[3] See, for example: CJEU, judgement of 11 December 2007, case C-161/06, *Skoma Lux*, ECLI:EU:C:2007:773 – (lack of) legal force for a Regulation that has not been translated into Czech; CJEU, judgment of 7 November 2013, joined cases C-249/12 and C-250/12, *Tulică and Plavoşin*, ECLI:EU:C:2013:722 – interpretation of the Central Tax Commission contrary to Directive 2006/112/EC; CJEU, judgement of 30 September 2010, case C-392/09, *Uszodaépitő*, ECLI:EU:C:2010:569 – loss of the right to deduct VAT with retrospective effect.

[4] See cases: CJEU, judgement of 21 June 2012, joined cases C-80/11 and C-142/11, *Mahagében* and *Péter Dávid*, ECLI:EU:C:2012:373; CJEU, order of 16 May 2013, C-444/12, *Hardimpex*, ECLI:EU:C:2013:318; CJEU, judgement of 19 October 2017, C-101/16, *Paper Consult*, ECLI:EU:C:2017:775. For a more detailed account of most cases concerning the abovementioned case-law, see Costaş (2016).

[5] For a detailed review of all these matters, see Mastellone (2018).

References

1) Costaş, C.F. (2016). Taxa pe valoarea adăugată, un Road to Perdition al dreptului fiscal: de la Halifax la Signum Alfa Sped. *Tax Magazine*, 12/2016, pp. 770-801.

2) Mastellone, P. (2018). Taxpayers' procedural rights in the transnational tax assessment: state of art and future perspectives. *Cluj Tax Forum Journal*, 1/2018, pp. 5-26.

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This volume is the result of the project Jean Monnet CHAIR European Financial Regulation, reference no. 574702-EPP-1-2016-1-RO-EPPJMO-CHAIR, supported by the Erasmus+ Programme of the European Union, and reunites the papers presented at the International Conference „European Financial Regulation - EUFIRE 2018", organized at „Alexandru Ioan Cuza" University of Iasi, in May 2018. The volume approaches different aspects of the financial and banking regulatory framework in the European Union, especially focusing on its dynamics, structural components, deficiencies and means of reinforcement, given the current challenges. Through its inter-disciplinary contents, the volume addresses to academics, researchers, public policy-makers and all those interested in a deeper understanding of the specific issues of the European financial, banking and tax regulation.

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